CLERK

Petition not granted

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 76

JESSIE WILLIAM MILLER, PETITIONER

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 21, 1942
CERTIORARI GRANTED JUNE 8, 1942

SUPREME COURT OF THE UNITED STATES

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1 In United States Circuit Court of Appeals,
Eighth Circuit

No. 11958—November Term, A. D. 1941

JESSIE WILLIAM MILLER, APPELLANT

vs.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the District Court of the United States for the Western District of Arkansas

Mr. Phil G. Alston filed brief for Appellant.

Mr. Thomas C. Pitts, Assistant United States Attorney (Mr. Clinton R. Barry, United States Attorney, and Mr. John E. Harris, Assistant United States Attorney, were with him on the brief) for Appellee.

Before SANBORN and JOHNSEN, Circuit Judges, and NORDBYE, District Judge

Opinion

November 25, 1941

NORDBYE, District Judge, delivered the opinion of the court.

The appellant, Jessie William Miller, was convicted of the crime of kidnapping under the so-called Lindbergh Law, 18 U. S. C. A. 408a, Act of June 22, 1932, as amended by Act of May 18, 1934, Chap. 301 48 Stat. 781. The indictment charges that the appellant and his wife Artilla Miller, on
2 or about August 28, 1939, lured, decoyed, kidnapped and inveigled one Dorothy Garner from a point in Arkansas to a point in the State of Texas for the purpose of holding her in involuntary servitude and to make her work in their behalf, and that they held her in such captivity and servitude by force, threats, and beatings until February 28, 1940. The indictment further charges that the luring and inveigling consisted of certain false statements made by the defendants to Dorothy Garner to the effect that her grandfather was ill in Texas and desired her to come to him. It was alleged that, at the time of the kidnaping, Dorothy Garner was over eighteen years of age and a married woman.

Dorothy Garner is the illegitimate daughter of Artilla Miller, wife of the appellant. The marriage of the appellant and Artilla Miller took place subsequent to the birth of Dorothy Garner, whose putative father was a man by the name of Monroe. She

was approximately eighteen months old when her mother married the appellant and she lived in their household for about four months. Thereafter, she lived with her grandfather until, with the consent of the mother, she was married on September 6, 1936, to one Will Garner. At the time of her marriage she was approximately fifteen years of age. The testimony was in conflict as to whether or not she had attained her eighteenth birthday when the offense herein took place. However, at the close of all the testimony, the court directed a verdict of not guilty as to the mother, Artilla Miller, but refused to instruct the jury, as appellant requested, that if they found that Mrs. Garner was not eighteen years of age at the time of the offense, they should acquit him. It was appellant's contention that, as the husband of the mother of the illegitimate daughter who was kid-
3 naped, he was a parent within the meaning of the statute, and consequently, if she was a minor, he was entitled to an acquittal.

This appeal does not raise any other question but the correctness of the court's ruling in refusing to submit to the jury the age of Mrs. Garner at the time she was kidnaped. It was the trial court's opinion that this question was immaterial because the appellant was not a parent within the purview of the statute. It is recognized that Mrs. Garner was domiciled in Arkansas at the time of the offense, and under the laws of that State a girl under eighteen years of age, although married and thereby emancipated, is considered a minor. Pope's Digest of the Statutes of Arkansas, Section 6215, states:

"Males of the age of 21 and females of the age of 18 years shall be considered of full age for all purposes and until those ages are attained, they shall be considered minors."

See, Watson v. Billings, 1881, 38 Ark. 278, 42 Am. Rep. 1; Harrod v. Myers, et al. 1860, 21 Ark. 592, 76 Am. Dec. 409.

The pertinent portion of the Act in question provides:

"Whoever shall knowingly transport or cause to be transported, or aid or abet in transporting, in interstate or foreign commerce, any person who shall have been unlawfully seized, confined, inveigled, decoyed, kidnaped, abducted or carried away by any means whatsoever and held for ransom or reward or otherwise except, in the case of a minor, by a parent thereof, shall, upon conviction, be punished * * *."

This statute as first enacted (June 22, 1932) was limited to cases of kidnaping for reward or ransom. Later, on May 18, 1934, the Act was amended so as to extend jurisdiction to
4 cases where a person was kidnaped by any means and held for ransom or reward *or otherwise, except, in the case of a minor by a parent thereof.* [The italicized portion indicates

the amendment.] Manifestly, the exception noted was prompted by the extension of federal jurisdiction to all kidnaping involving interstate commerce, regardless of the purpose for which the kidnaped person was held. Gooch v. United States, 297 U. S. 124. The records of the domestic relations courts throughout the Nation are replete with instances where, when domestic difficulty arises, parents, because of affection for their children, inveigle or spirit them away. In absence of the exception, such person might suffer the condemnation of the statute if interstate commerce were involved. It may be that Congress was primarily concerned with this class of cases when the exception was framed. This view is in accord with the dictum in the Gooch Case, wherein Justice McReynolds, in discussing the 1934 amendment, but with reference to its application to the kidnaping of police officers who were held by gunmen for the purpose of avoiding apprehension or preventing an alarm being given, stated (p. 128 of 297 U. S.):

"* * * If the word reward, as commonly understood, is not itself broad enough to include benefits expected to follow the prevention of an arrest, they fall within the broad term, 'otherwise.'

"The words 'except, in case of a minor, by a parent thereof' emphasize the intended result of the enactment. They indicate legislative understanding that in their absence a parent, who carried his child away because of affection, might subject himself to condemnation of the statute. Brown v. Maryland, 12 Wheat. 419, 436."

The appellant contends, however, that he is entitled to the most liberal and favorable interpretation of the statute consistent with legislative intent, and that, if he is afforded such construction, he should be characterized as a parent within the meaning of the Act. At the outset, it should be noted that, by strict construction, the appellant was not the stepfather of Mrs. Garner. The term "stepfather" generally means the husband of one's mother by a subsequent marriage. 60 Corpus Juris, p. 32. Or, as stated in 46 Corpus, p. 1337:

"The relation of step-parent and stepchild is that existing between a husband or wife and the child of his wife or her husband as the case may be by a former marriage."

See, Thornburg v. American Strawboard Co., 141 Ind. 443, 445, 45 N. E. 1062, wherein it was stated:

"As generally understood, the husband of one's mother by a subsequent marriage is a stepfather; strictly speaking, therefore, a man who marries the mother of an illegitimate child does not become the stepfather of such child."

The definition of the term "step-parent", however, is not particularly important nor is it controlling herein. Even though it may be assumed that, if Mrs. Garner had been a member of appellant's household, cared for and nurtured by him and in his custody and control, the relationship of stepfather and stepchild would have existed in the generally accepted usage of such terms, the evidence herein does not present such a picture. At the time of the kidnaping, Mrs. Garner was living with her husband at DeQueen, Arkansas, and had been married for about three years. She had assumed a new duty as a wife with a responsibility to her husband and to her own home. She was no longer subject to the control or supervision of her mother. She was an emancipated married woman. From the time she was twenty-two months of age until her marriage, she had made her home with her grandfather, except for a short period when she
6 was in an orphanage. She was neither a member of appellant's household nor of his wife's household. It is conceded that he had never assumed any parental relationship to her. He had never supported her and had never presumed to exercise any custody or control over her.

The term "parent" primarily means one who begets a child. It usually denotes consanguinity rather than affinity. However, it is also well recognized that the term "parent" in a broad sense and under certain circumstances may include anyone who stands in a position equivalent to that of a parent. However, the appellant had never accepted any of the duties and liabilities, or exercised any of the rights of one who stood in loco parentis. In so far as any actual parental relationship was concerned, he was at the time of the offense, at least, substantially the same as an utter stranger to this minor. A step-parent, by reason of this relationship alone, has no right to the custody or control of the stepchild. Englehardt v. Yung's Heirs, 1884, 76 Ala. 534; Ex parte Flynn, 1917, 87 N. J. Eq. 413, 100 Atl. 861. Nor has he any duty to support the stepchild. State v. Barger, 14 Ohio App. 127; Kempson v. Goss, 1901, 69 Ark. 451, 64 S. W. 224; Copek v. Kropik, 1889, 129 Ill. 509, 21 N. E. 836; In re Besondy, 32 Minn. 385. A stepfather does not merely by reason of such relationship stand in loco parentis to the stepchild. Popejoy v. Hydraulic Pressed Brick Co., 193 Mo. App. 612, 186 S. W. 1133. The assumption of the relationship is a question of intention. Howard v. United States, 2 F. 2d. 170; Meisner v. United States, 295 F. 866, 868; Dix v. Martin, 171 Mo. App. 266, 157 S. W. 133. Neither intention nor fulfillment is found herein. A fair consideration of the entire record impels the conclusion that
7 the evidence is barren of any fact or circumstance which would even remotely tend to establish the relation of par-

ent and child at the time of the offense as between the appellant and the person he kidnaped. We do not desire nor attempt to lay down any rule which will apply to all situations where the question may arise as to the construction to be given to the exception in this statute. Presumably, each case must be decided on its own merits. Any construction should, however, not only harmonize with the context of the Act, but the end in view. A construction which would lead to absurd results is to be avoided. It is our view that, even under the broadest and most latitudinarian definition or understanding of the term "parent," the appellant's relationship to this minor at the time of the offense cannot be so characterized.

Furthermore, the exception of this statute must be strictly construed. The burden was on the defendant to bring himself within the exception. Detroit Edison Co. v. Securities & Exchange Commission, 119 F. 2d 730; Schlemmer v. Buffalo, Rochester & P. R. Co., 205 U. S. 1; McKelvey v. United States, 260 U. S. 353. This he conspicuously failed to do. The trial court was right in holding that the evidence impels a finding that the appellant was not a parent of Mrs. Garner as that term is used in the exception of the Act, and therefore the requested instruction was rightfully refused. No other question having been raised on this appeal, it follows that the judgment must be and is affirmed.

8 In United States Circuit Court of Appeals, Eighth Circuit

[Title omitted.]

Petition for rehearing and writ of certiorari

Filed Jan. 5, 1942

To the Honorable, Senior, Presiding Judge, for the United States Circuit Court of Appeals, Eighth Circuit:

Comes now the petitioner, Jessie W. Miller, and respectfully requests this Honorable Court to issue a Writ of Certiorari to the District Court of the Western District of Arkansas, to have prepared at Government expense, a full and complete record of all the testimony given in the case, and to forward same and said record to this Honorable Court for review and reconsideration.

APPELLANT'S STATEMENT

I, Jessie W. Miller, with my wife and three children, were employed at cotton picking at McKenney, Texas, at such time as

we were in receipt of a letter from one, Dorothy Garner, plaintiff, asking that we "come after her"; we, complying with her request drove into the State of Arkansas as she had requested in her letter. She requested that we tell "her man," Will Garner, that the plaintiff's grandfather was ill in order to leave the impression with Will Garner that she was not leaving him; this was done by her mother. After living with myself and family for some six months, plaintiff became offended because she was unable to do as she wished in the presence of our children. She had further "inflicted punishment" upon her 18-months-old child, until such time as her mother took charge of the infant and cared for it; further she became incensed and offended because she could not do the things referred to herein and so left us, hitch-hiking on a 200 mile trip, being hurt on the way, and when she arrived at the home of her "man," told him her story in order to "make up" with him.

9 When the Honorable Harry J. Lemley, Judge, imposed sentence upon me, he admitted as follows:

"There is doubt in my mind of you having criminal intent when you went after the girl."

The Judge then imposed a 7-year sentence upon me, later entering a Court order reducing the sentence to 5 years, stating as follows:

"I have never heard or tried a case like this one in my life." Congress never intended that a man be punished for a kindly deed. Further, with due respect to my attorney, appointed by the court; the question of Plaintiff's age was raised in the appeal which was bitterly opposed, regardless of my desire to have such question raised and my attorney ignorant of the law in this respect. The evidence did not support the verdict, and I, without friends, could not do otherwise than accept the verdict. Thanking you for your kind attention, I remain

Very sincerely,

JESSIE W. MILLER,
Jessie W. Miller,
Appellant.

10 *Statement of the Case*

Record will show:

Jessie W. Miller, defendant, was picking cotton for Mr. Hartline at McKinney, Texas, at the time of receipt of a written request from Dorothy Garner, plaintiff. Defendant left Mr. Hartline's home and went to Arkansas after plaintiff and returned the next day and continued to pick cotton for a period of 10 days. During said period plaintiff was at her liberty and

all worked together. Defendant and wife went to town and left plaintiff alone at Mr. Hartline's home where it was possible for her to use the telephone should she desire to do so, or to have left had she so desired; however, plaintiff failed to do so, and further, at no time did she mention that anything was wrong. This was the first stop made with plaintiff and she was treated as one of the family by the defendant and said family, everything being normal and all was as it should be in relationships between the members of the group.

Testimony of Mr. Fred Cotton, Snyder, Texas:

"Defendant and family stayed at my place two weeks, and picked cotton, and were in my yard and house, before day, and after night, and plaintiff went anywhere she wished and got wood and water at my back door, and the defendant and wife went to town and left the plaintiff at my house, and everything was OK."

Testimony of four other witnesses.

"While defendant was incarcerated at Snyder, Texas, over plaintiff's misbehavior, the plaintiff was examined by a medical doctor, and questioned by law enforcement officers and was in the Court House with the court officials alone, and the doctor said plaintiff was weak-minded and that they couldn't find anything otherwise wrong."

Record will show:

"Plaintiff stayed in a tourist camp at Snyder, Texas, while defendant and family worked, and plaintiff talked to people; had free access to the telephone, or could at any time have told anyone she was "fooled" away from her home, but plaintiff failed to do so."

11

Record will show:

"Plaintiff wrote two letters to Will Garner, plaintiff's husband, and one at Fort Worth, Texas, on the road to Snyder, Texas, and stated she had another 'man' and one at Sherman, Texas, and asked him to come after her baby."

Record will show:

"Plaintiff was very cruel to her baby."

At Sherman, Texas, where the defendant lived when arrested, the record will show:

Testimony of the 15th District Judge, Mr. H. J. Arterberry, F. B. I., Dallas, Texas, and other responsible persons:

"That they talked to plaintiff and saw her all over town at different times, going wherever she wished. Some witnesses, Mr. McClure and Mr. Frank Fielder, ran a business within one hundred and twenty-five feet of the tourist cabins where defendant lived and that everything was OK."

Record will show:

Mrs. Raymond Russell's testimony:

"She talked to the plaintiff at a point 15 blocks from home and asked plaintiff why she had left her husband and plaintiff replied, 'He wasn't what I thought he was.'"

Testimony of Mr. H. T. Arterberry, F. B. I.:

"I went to defendant's home and made an investigation, a month prior to his arrest, and when I arrived at defendant's home, the plaintiff was out looking for work, and I left and later returned and talked to her. After identifying myself to plaintiff, she declared that Will Garner, plaintiff's husband was behind it all, and I couldn't find anything wrong, and after investigating through the sheriff and police force, everything was alright."

12 The record will show:

"Plaintiff was wilfully delinquent with men over her age, and was feeble-minded at age of 10 years." Testimony of Dr. J. N. Norman, Trenton, Texas.

The record will show:

"That plaintiff left defendant's home because her mother (defendant's wife), inflicted punishment upon plaintiff for displaying "sexual misconduct" in the presence of defendant's three children."

The record will show:

"The plaintiff never complained of being fooled, lured, or kidnaped away from her home, and that she did at all times have her freedom."

The record will show:

"That the plaintiff, when she left defendant's home, had not been beaten, nor was she bruised as the prosecution attempted to show."

Therefore, the defendant, Jessie W. Miller, now appellant, does not desire to cause the court any grievance; however, appellant sincerely prays that said court will demand the full transcript of record since Jessie W. Miller, appellant, is not guilty of the crime accused and for which he was sentenced and committed.

Respectfully submitted.

JESSIE W. MILLER,
Petitioner.

Sworn and subscribed to before me this 2nd day of January 1942.

[SEAL] GEORGE D. EBERSTEIN,
Notary Public.

My commission expires May 8, 1944.

[File endorsement omitted.]

13 In United States Circuit Court of Appeals, Eighth Circuit

No. 11958—November Term, A. D. 1941

JESSIE WILLIAM MILLER, APPELLANT

vs.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the District Court of the United States for the Western District of Arkansas

Before SANBORN and JOHNSEN, Circuit Judges, and NORDBYE, District Judge

Opinion

Jan. 19, 1942

(On applications for appointment of counsel for appellant and for order directing that complete transcript of all testimony be sent to this Court, etc.)

PER CURIAM: Since this Court decided this case (November 25, 1941), 123 F. 2d 715, the appellant has filed applications praying (1) for the appointment of counsel to conduct further proceedings in his behalf, and (2) for an order directing that, at the Government's expense, a full and complete transcript of all of the testimony taken at his trial be sent to this Court to enable it to review and reconsider his case. Attached to these application is a "Statement of the Case," which, if true, indicates that the appellant was wrongfully convicted of the crime of kidnapping.

The record on appeal was only sufficient to present the one question which was submitted to this Court for decision, namely, whether the trial court should have submitted to the jury the question of the age of the person who was allegedly kidnapped by the appellant, it being his contention that such person was a minor and that he was her parent because she was the illegitimate child of his wife, and that therefore he came within the exception in the applicable statute which excluded the kidnapping of a minor child by a parent. We have decided the only question presented to us adversely to the appellant and have affirmed
14 his conviction. We have no intention of reconsidering the question decided. Ordinarily under such circumstances the case should be ended so far as this Court is concerned.

However, in Holmes v. United States, — U. S. —, 62 S. Ct. 357, the Supreme Court, "on the Government's consent," vacated a

judgment of this Court affirming a conviction (see 115 F. 2d 528), and ordered this Court to conduct further proceedings. We had affirmed the judgment in the Holmes case because there was no bill of exceptions (the testimony at the trial had not been reported) and because we were led to believe from the representations made by the United States Attorney for the District of Nebraska and by counsel appointed by us to represent the appellant in that case that there was no possibility that a bill of exceptions sufficient to enable us to decide the questions which the appellant sought to present could ever be procured. In view of the Government's action in the Holmes case, it seems advisable in this case to give the Attorney General of the United States, as well as the United States Attorney who tried the case, the opportunity to inform us as to the Government's position in the matter, so that, if the Government desires to consent to the reopening of the case, it may do so here, without subjecting the appellant to the unnecessary burden in such a situation of having to petition for certiorari, before the consent is granted.

It is therefore ordered that the Clerk of this Court forward by mail both to the Attorney General of the United States and to the United States Attorney for the Western District of Arkansas copies of this order and of the appellant's applications, and that they make their respective responses to the applications within thirty days from the date of the filing hereof.

It is further ordered that a copy of this order be mailed by the Clerk to the appellant, that the Government mail copies of its responses to the appellant, and that he have ten days after he has received copies of the responses to file his reply thereto with the Clerk of this Court.

January 19, 1942

15 In United States Circuit Court of Appeals,
Eighth Circuit

[Title omitted.]

Response of appellee to order of January 19, 1942

Filed Feb. 18, 1942

Comes now Clinton R. Barry, United States Attorney for the Western District of Arkansas, who makes the following response to the order of this Court filed January 19, 1942, for and on behalf of the Attorney General of the United States and as Attorney for Appellee herein.

In response to the order of this Court filed January 19, 1942, directing that response be made to said order, he respectfully states:

That Appellant was indicted in the U. S. District Court for the Western District of Arkansas, on May 22, 1940, said indictment, in one count, charging the said Appellant Jesse William Miller, with a violation of Section 408A, Title 18, U. S. C. A. Said indictment is as follows, to wit:

UNITED STATES OF AMERICA,
Western District of Arkansas, Fort Smith Division, ss:

In the District Court of the United States, in and for the Western District of Arkansas, at the January adjourned Term thereof, A. D. 1940,

The Grand Jurors of the United States impaneled, sworn, and charged at the Term aforesaid, of the Court aforesaid, on their oath present, that Jesse William Miller, and Artilla Miller, on the 28th day of August, 1939, in the said Texarkana Division of said District and within the jurisdiction of said Court, and in the town of De Queen, and State of Arkansas, did unlawfully, willfully, and feloniously inveigle, decoy, kidnap, and abduct one Dorthie Crawford Garner, a married woman, then and there residing at or near De Queen, Sevier County, Arkansas, by falsely and fraudulently representing to the said Dorthie Crawford Garner that her grandfather, J. H. Crawford, then residing at Trenton in the State of Texas, was seriously and violently ill and that he wanted to see the said Dorthie Crawford Garner, and by such false and fraudulent representations, the defendants thereby persuaded her, the said Dorthie Crawford Garner, to accompany them from De Queen, Sevier County, Arkansas, to a point near the town of McKinney, in the State of Texas, for the sole and deliberate purpose of forcing the said Dorthie Crawford Garner to work and labor for the said defendants near McKinney, Texas, and other places to the Grand Jurors unknown, and forced her, the said Dorthie Crawford Garner, to so work by means of threats, intimidations, and violent beatings inflicted by the defendants upon the person of the said Dorthie Crawford Garner, and that they so held the said Dorthie Crawford Garner against her will under said threats, intimidations, and violence inflicted upon her person in servitude from August 28, 1939, to February 29, 1940, when the said Dorthie Crawford Garner escaped from the custody of said defendants, the said Dorthie Crawford Garner on all dates mentioned herein being over the age of eighteen years, contrary to

the form of the statute in such case made and provided, and against the peace and dignity of the United States.

CLINTON R. BARRY,
United States Attorney.
By HARDY K. MACLAY,
Acting Assistant U. S. Attorney.

The trial of this case commenced in the Texarkana Division of the U. S. District Court for the Western District of Arkansas on January 27, 1941, and lasted until February 3, 1941, at which time said case came to a conclusion by a jury verdict of guilty as to the appellant Jesse William Miller.

17 The case of Holmes v. United States — U. S. —, 62 S. Ct. 357, is very different from the instant case and the distinction is clear, in, that in the instant case all of the case was reported by the Official Court Reporter, whereas in the Holmes case, supra, Holmes was indicted with two co-defendants and all of the defendants employed a regular court reporter. Holmes' two codefendants changed their plea from not guilty to nono contendere and prior to the introduction *os* testimony the reporter left. Present at the trial in the Holmes case as a Government witness was a Miss Mary Rose Murtaugh, who was closely associated with the defendants and their activities, having been a member of the Board of Directors and the Secretary of three of the corporations involved. She was an important witness for the Government; since her testimony outlined the business of the companies in detail, and she also identified many exhibits *p*ffered and received in evidence. While Miss Murtaugh was a stenographer she had had no experience as a court reporter. After she had testified and after a Mr. Holtzman, the bookkeeper of the companies, had completed part of his testimony Holmes' attorney requested that Miss Murtaugh be permitted to occupy the reporter's table and report the evidence. Because of the fact that the Government objected to this, but had no objection to her sitting at the counsel table and making notes for the benefit of Holmes and his attorney, the trial court permitted this to be done. Sometime after the trial counsel for Holmes had Miss Murtaugh to transcribe the testimony from her notes, but the United States Attorney pointed out that the transcript was incomplete and inaccurate. It omitted some of the testimony of Holtzman and another witness as well as Miss Murtaugh's own testimony, which was important, and the testimony transcribed was in many instances inaccurately reported. The Government in the Holmes case consented to vacate the judgment of this Court affirming the conviction, and the Supreme Court ordered this Court to vacate its order affirming the judgment of conviction and to enter an order affording reasonable time for the

preparation, presentation, settling, and filing a suitable bill of exceptions. The consent of the Government was based upon the fact that after the Holmes case, supra, came up to the Supreme Court the attorneys for the Government ascertained from the U. S. Attorney representing the appellee in this Court that by earnest cooperation between him and counsel for Holmes it was likely that a satisfactory bill of exceptions could be prepared. The Government consented to remand of the Holmes case in order that this could be done. The clear distinction being that in the instant case the entire proceeding and testimony was reported by the official court reporter for the Texarkana Division of the U. S. District Court for the Western District of Arkansas, and a complete bill of exceptions and transcript of the record was available to the appellant, whereas in the Holmes case, supra, only parts of the testimony was reported and that not by an official court reporter.

With reference to that part of the appellant's petition requesting an order directing that at the Government's expense a full and complete transcript of all the testimony taken at his trial be sent to this Court to enable it to review and consider his case, it is to be noted that under a ruling of the Comptroller General (9 Comp. Gen. 503) the Government is without authority to pay for the cost of a transcript of testimony for the use of an indigent defendant appealing in forma pauperis under Section 832, Title 28, U. S. C. A.

As heretofore stated, the trial of this case lasted seven days and many witnesses were introduced in behalf of the Government and the defendant. The Government proceeded to introduce witnesses to support the allegations and charges contained in the indictment heretofore set out. It was the defense of the appellant Jesse William Miller in the trial court that he did not kidnap the said Dorthie Crawford Garner, but that he and his wife went to the home of Dorthie Crawford Garner, who had requested in a letter for them to come after her to take her away from her husband, and that he did not hold her against her will and that she was free to leave at any time and introduced witnesses, including himself, in an attempt to establish his defense. It will be noted that in the bill of exceptions heretofore filed in this Court, the Court in its instructions to the jury (Bill of Exceptions 52 to 60, incl.) submitted to the jury in proper form instructions covering the testimony of the Government and the contentions heretofore stated by the appellant and the jury found the appellant guilty as charged in the indictment. As heretofore stated, the testimony in this case, if transcribed, would be voluminous, but the testimony introduced in behalf of the Government at the trial sub-

stantiated the allegations contained in the indictment, the defendant denying same and defending as above, and the jury finding the appellant guilty as charged in the indictment under proper instructions of the Court. The appellant was represented by able counsel during the trial of this case and a reading of the appellant's brief at page 21 will show that the jury found the defendant guilty as charged in the indictment upon substantial evidence.

The affidavit of Thomas C. Pitts, Assistant United States Attorney for the Western District of Arkansas, who was one of the attorneys who represented the United States in the trial of this case, is attached and made a part of this response. It appears from this affidavit that the official reporter of the Court, Mr. John T. Williams, recorded all of the evidence in the case and now has his notes available to be transcribed. It must be conclusively presumed that the petitioner and his counsel know that this evidence is available. It also appears from Mr. Pitts' affidavit that the Court Reporter for the Texarkana Division of the Western District of Arkansas, is Secretary to Judge Harry J. Lemley. Under these circumstances there is no legal method by which the Court Reporter can be paid by the United States for furnishing this transcript. Under the rulings of the Comptroller General of the United States not only is the Government not liable for a transcript of the evidence to be used in making a bill of exceptions where the appeal is taken in forma pauperis, but the Government is not liable to a Court Reporter who draws a salary as Secretary to a District Judge for a transcription of the evidence in any case, even in those cases where the United States itself is the appellant, such as War Risk Insurance cases, and the Court Reporter cannot be required to furnish a transcript of the evidence to the Government under these circumstances. Inasmuch as the trial of this case occupied the Court for seven days it would be utterly unreasonable to ask the Court Reporter to furnish this transcript and, since Judge Lemley's court faces the prospect of trying from 75 to 100 land condemnation cases in connection with the Hope Ordnance Proving Ground, it is very doubtful that his court reporter could furnish this transcript at any time during the next several months.

This factual situation thus presents this clear legal question: Is a defendant who claims to be ignorant, or actually is ignorant, on that ground alone not within the ordinary and generally accepted rule by which he is bound by the judgment and decision of his lawyer as to matters which by their nature involve the knowledge and application of statutes and rules of procedure, and which are not generally understood even by the most intelli-

gent and best-informed laymen. If this question is to be answered in the affirmative in Federal Courts the situation demands that clear-cut rules of decision be laid down under which trial courts may safely proceed with the feeling that the case is finally disposed of as far as the trial court is concerned when a judgment is entered and mittimus issued. No better case can be found to present this question than the one at bar. The defendant was indicted several months before his trial. He filed an affidavit in forma pauperis several months before his trial and no limitation was placed upon the number of witnesses he was permitted to call from distant points in his behalf, as it was the opinion of the U. S. Attorney that the statute limiting the number to be called at the expense of the United States had no application to a capital case. As the lawyers who defended Miller will probably never see this response we do not hesitate to say that the defense they made was one of the best ever offered in that court. The sufficiency of the Government's evidence was brought before the Court for a direct ruling on a motion for a directed verdict. The Court heard all of the evidence and promptly denied this motion. Instructions were given to the jury by the Court, who had also heard all of the evidence, placing the issue before them as to whether or not the defendant had actually done the things which in law made him guilty of the
21 offense charged in the indictment. The jury promptly said that he had.

The defendant/s counsel was of the opinion that substantial evidence of defendant's guilt had been heard by the jury and that no good purpose could be served by attempting to argue to the Circuit Court of Appeals that the Court should believe Miller's practically unsupported statements as against the well-corroborated evidence of the Government, consequently they decided not to attempt to secure a reversal on that ground. Thus we have the following interesting sequence of events in which the sufficiency of the evidence against petitioner was involved. The case was originally investigated by the Federal Bureau of Investigation. Agents engaged in investigations of this kind are all lawyers and are employed on a salary basis. The agent or agents who investigated the complaint against Miller believed that the facts they uncovered were sufficient to establish Miller's guilt in court. Their report came to the desk of the United States Attorney who carefully read the same and weighed the question of whether a conviction could be secured in the case, it being the opinion of the United States Attorney that a conviction would probably follow an indictment. These facts were submitted to a Grand Jury and after hearing the witnesses under oath, the Grand Jury were of the opinion that the facts pointed

to the defendant's guilt. The Government next presented these facts to a trial jury which also heard all that the defendant could offer in defense, all of which was heard by Judge Lemley, the trial judge. Judge Lemley was of the opinion that the evidence testified to by Government witnesses, if true, justified Miller's conviction and submitted the question to the jury of whether or not this evidence was true. It must be presumed that the defendant's counsel was of the opinion that if the jury believed the Government's evidence the defendant could only escape final conviction by seeking reversal in this Court on the question of law. The conviction having been affirmed, the defendant by his unsupported statement seeks to overturn the whole sequence of events by which his conviction was secure.

If the inference is to be drawn from his statement that no
22 testimony sufficient to establish his guilt was presented to the trial court then the entire personnel of employees and officials of the United States who acted in this case from its inception to the end must be charged either with an utter lack of mental capacity and understanding or with a willful indifference to the rights of an American Citizen, and this charge must include the defendant's own lawyers as well as all of the Government officials involved in the matter.

It is quite possible that the attention of this Court has been arrested by the fact that Judge Lemley, long after he had sentenced Miller, reduced his sentence by two years. The affidavit of Clinton R. Barry, United States Attorney, on this question is attached. As shown by this affidavit Judge Lemley stated that he had calculated the original sentence on the basis that he wanted to feel assured that Miller's children would reach an age when they could shift for themselves and not be likely to be influenced by Miller upon his return from the penitentiary. And that he took into consideration the fact that Miller had served a previous sentence for an infamous crime and was therefore not likely to receive the benefit of a parole. He stated that it had afterward been shown to him that Miller's wife either had obtained a divorce or was about to obtain one and he therefore felt that Miller's future influence over his children need not be further considered, and that for this sole reason he had, on his own motion, reduced the sentence by two years.

Respondent sincerely believes that should the testimony in this case be transcribed, that, after a careful reading of the same by this Court, conviction of the appellant would be upheld by this Court as the jury found the defendant guilty as charged based upon substantial evidence supporting the allegations in the indictment.

In view of what has heretofore been said respondent believes that there is no merit in the appellant's motion for a rehea[illegible]

and complete transcript of all the testimony in this case at Government expense and his petition should be dismissed.

Respectfully submitted.

CLINTON R. BARRY,
United States Attorney,
By THOMAS C. PITTS,
United States Attorney,
Attorneys for Respondent.

23 *Affidavit of Clinton R. Barry*

UNITED STATES OF AMERICA,
Western District of Arkansas, Fort Smith Division, ss:

Clinton R. Barry, on oath, says: That he is U. S. Attorney for the Western District of Arkansas, and was at the time mentioned in this affidavit. That on the day that Judge Harry J. Lemley entered an order reducing the sentence of Jesse William Miller from seven years to five years imprisonment, at Texarkana, Arkansas, he was called to Judge Lemley's Chambers and found Judge Lemley there with attorneys representing Miller; and Judge Lemley stated that he had originally sentenced Miller to a seven-year term of imprisonment and that he had decided upon this length of term because he had noted the ages of Miller's children and intended that Miller should remain in prison until his children had reached an age that they could if necessary support themselves and would be too old to be influenced by Miller, and that he had taken into consideration the fact that Miller had served a prison term for an infamous crime and probably would not be paroled; that it had been represented to him by Miller's attorneys that Miller's wife had sued him for a divorce and had either obtained a decree of divorce or would obtain one in the near future, and that under these circumstances he would revise Miller's sentence as he would no longer have to take into consideration the welfare of Miller's children. Further deponent saith not.

CLINTON R. BARRY.

Subscribed and sworn to before me this 16th day of February 1942.

[SEAL] W. PENDERGRASS, JR.
My com. exps. Feb. 1, 1943.

24 *Affidavit of Thomas C. Pitts*

UNITED STATES OF AMERICA,
Western District of Arkansas, Fort Smith Division, ss:

Thomas C. Pitts, on oath, says: That he is Assistant United States Attorney for the Western District of Arkansas, and was at the time mentioned in this affidavit; that he assisted as co-

counsel for the Government in the trial of the case of United States v. Jesse William Miller and Artilla Miller, in the Texarkana Division of the U. S. District Court for the Western District of Arkansas, and being Criminal Case No. 3541, Texarkana Division; that said case commenced on January 27, 1941, and continued to and included February 3, 1941; that John T. Williams, who is the Secretary of Judge Harry J. Lemley of the U. S. District Court, and who is also the Official Court Reporter for the Texarkana Division of the U. S. District Court for the Western District of Arkansas, recorded by shorthand all of the evidence and proceedings in this case and knows that the notes of the trial recorded by the said John T. Williams were available at the conclusion of said trial and he further states that he has personally verified through the said John T. Williams that said notes recorded by John T. Williams are still available at this time. John T. Williams is at this time Secretary to U. S. District Judge Harry J. Lemley and Official Reporter for the Texarkana Division of the Western District of Arkansas. Further deponent saith not.

THOMAS C. PITTS.

Subscribed and sworn to before me this 16th day of February 1942.

[SEAL] W. PENDERGRASS, JR.

My com. exps. Feb. 1, 1943.

[File endorsement omitted.]

25 In United States Circuit Court of Appeals, Eighth Circuit

[Title omitted.]

Appellant-petitioner's answer to appellee's response

Filed March 5, 1942

Comes now, Jessie W. Miller, Appellant-Petitioner, in his own proper person, and makes this, his, answer to the Appellee's Response to the Order of this court filed January 19, 1942; said order reading as follows:

"Since this court decided this case (Nov. 25, 1941), 123 Fed. (2d) 715, the Appellant has filed applications praying (1) for the appointment of counsel to conduct further proceedings in his behalf, and (2) for an Order directing that, at the Government's expense, a full and complete transcript of all of the testimony taken at his trial be sent to this court to enable it to review and reconsider his case. Attached to these applications is a "State-

ment of the Case," which, if true indicates that the appellant was wrongfully convicted of the crime of kidnapping."

And further:

"In view of the government's action in the "Holmes Case," it seems advisable in this case to give the Attorney General of the United States, as well as the United States Attorney who tried the case, the opportunity to inform us as to the government's position in the matter, so that, if the government desires to consent to the reopening of the case, it may do so here, without subjecting the Appellant to the unnecessary burden in such a situation of having the petition for certiorari, before the consent is granted."

Your petitioner-appellant, Jessie W. Miller, verily believes that the above-quoted order issued by this honorable court was equivalent to "An order to Show Cause" why the writs petitioned for should not be granted, and your petitioner, not being skilled in the Science of Law, seeing no other reason, now proceeds to answer the government's response in that belief.

"One"

Your petitioner made various claims in his applications for rehearing and for a writ of Certiorari that a transcript of the testimony given by all the witnesses at the trial would prove that no such crime of kidnapping, as petitioner was charged with, has ever occurred, and that the conviction was not supported by the evidence, and that the facts as would be found only in the transcript of the testimony would prove that he had been wrongfully convicted of kidnapping.

All of the claims, as to what the "Record Will Show," were completely ignored by the government in its "response." Not one time did the government deny that the transcribed record of testimony would show that which the petitioner swore
26 under oath would be found there, that the evidence did not support the verdict, but conversly would show that no crime of kidnapping was ever committed. This lack of a denial to what the "Record will show" in the government's response is no surprise to your petitioner. The government's attorney knows that every claim made under the heading "Statement of the Case" is positively, affirmatively, and absolutely true. He knew that he could not deny the truth of a written record, so he chose to completely ignore petitioner's claims as to what the transcribed "Record Will Show." The government's attorney, Mr. Clinton R. Barry, chooses to confine his response to this court's order to irrelevant and ext'aneous issues such as (1) The trial court's reason for reducing your petitioner's 7-year sentence to one of 5 years. (2) Pointing out to this learned court his idea of the difference

between the "Holmes Case" and your petitioner's case. (3) Pointing out the limits of this Honorable Court's authority and power to issue orders and writs. (4) Pointing out to this court that if your petitioner proved his innocense by the transcribed record, then all the government's employees would be charged with the utter lack of mental capacity. (5) Pointing out to this court that your petitioner was first investiggted, then indicted, the found guilty, then sentenced all according to form, leaving the inference that even if the transcribed testimony would show lack of evidence to support the guilty verdict, that it would be of no importance because the prescribed legal ritual and rote had been carefully observed. (6) Pointing out to this court that the agents of the Federal Bureau of Investigation "believed that facts they uncovered were sufficient to establish Miller's guilt in court," but failing to point out that no agent recommended that the said facts should be submitted to a Grand Jury, and failing to deny that the transcribed testimony would show that F. B. I. Agent Arteberry investigated the defendant and the plaintiff while the plaintiff was living at defendant's home, and had to report to the U. S. District Attorney's office that he could find nothing wrong.

Your petitioner would now call this court's attention again to this one true fact; the government does not and cannot deny that those claims, which your petitioner swears will be found in the transcribed testimony, which will prove your petitioner was wrongfully convicted of the crime of kidnapping, and under Rule #8 of the federal court procedure, paragraph (D), a lack of a denial is equivalent to an admission of the truth of the allegation. The rule, your petitioner believes to be as follows:

"Effect of failure to deny"

"Averments in a pleading to which a responsive pleading is required * * *, are admitted when not denied in the responsive pleading."

Your petitioner begs this Honorable court to adopt this
27 Rule #8 and apply it to his case, and issue the writ of certiorari to the District Court as an auxiliary writ in aid of its appellate jurisdiction of appeal, or issue an equivalent order to a writ of certiorari directing that the testimony in this capital case be transcribed at government expense and brought before this court to enable it to review and reconsider his case.

"Two"

Your petitioner does not think the full page and one-half of the respouse devoted to clarifying to this court the differences between his case and "The Holmes Case" merits any answer. This court knows the validity of its reasons for its orders. This

court is thoroughly familiar with its decision and its experiences in the Holmes Case.

"Three"

In answer to that part of the government's response which seeks to prove by a Ruling of the Comptroller General (9 Comp. Gen. 503) that the government is without authority to pay for the cost of a transcript of testimony for the use of an indigent defendant appealing in forma pauperis under Section 832 of Title 28 U. S. C. A.

Your petitioner does not believe the rulings of an officer of the Treasury department supercedes the construction of the U. S. Statutes made by the Circuit Courts of this nation. Your petitioner believes the interpretation of the "laws of the land" such as section 832 of Title 28 U. S. C. A. is an exclusive function of the "Courts of the Land" such as this honorable court, the United States Circuit Court for the Eighth Circuit.

Your petitioner has learned that this Honorable Court has held a few times in the past that it would not issue a writ of mandamus compelling the Court Reporter to furnish gratuitously to a pauper a transcript of evidence. "United States ex rel. Estabrook v. Otis, 8 Circuit, 18 Fed. (2D) 689." Your petitioner respectfully submits that his case is *different*, and a decision interpretating Section 832 of Title 28 should rest on the merits of each individual case.

Your petitioner believes it is clear and obvious that in a criminal case, especially a Capital Offense where life and liberty are involved, help to a poor litigant should be forthcoming readily and quickly if he has complied with all the requirements of the statute under which he seeks aid. Your petitioner further claims there is a distinct difference between requesting a transcript of testimony to be used in making a bill of Exceptions where the appeal is taken in forma pauperis, and in requesting the Circuit Court to issue an auxiliary writ in aid of its appellate jurisdiction on appeal, for the testimony to be transcribed at
28 government expense in a *in a* case already before the court and in its jurisdiction, for the exclusive use of the circuit court as an aid to determine whether or not "justice has been done" to a pauper defendant charged with a Capital Offense.

Your petitioner has learned that the writ of Scire Facias and Mandamus have been abolished, but the decisions prior to abolishing of these writs are still important. Mandamus, prohibition, and certiorari appear to have been the most important writs in this connection. The writ-issuing power of the Circuit Courts is not as restricted as the U. S. District Attorney seems to infer.

He states that there is no legal method by which the Court Reporter can be paid for furnishing this court a transcript of the

testimony in this case. Your petitioner verily believes that this court has the power in a case already in its jurisdiction and pending before it, to issue whatever writ or order that is necessary in aid of its appellate jurisdiction to see that justice is done even though it is an order for the costs of the transcript to be paid out of the funds of the government such as is paid to the Clerk of a District Court when that clerk prepares a transcript of a habeas corpus case which has been appealed to the Circuit Court in forma pauperis.

Your petitioner contends that Section 262 of the Judicial Code, 28 U. S. C. A., Sec. 377, gives this court power to proceed in the above-described way. The section reads as follows:

"The Supreme Court and the District Courts shall have power to issue writs of Scire Facias. The Supreme Court, the Circuit Courts of Appeal, and the District Courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."

Your petitioner respectfully contends that the government paid the reporter John J. Williams who is also secretary to the Honorable Harry J. Lemley, U. S. District Court Judge, for his work to record in shorthand all of the evidence and proceedings in this case at trial, and as a result of the government paying John T. Williams for recording the trial, all the notes which are now available are the property of the United States District Court for the Western District of Arkansas, and by all interpretations of law should now be in the custody of the "Clerk of the Court" for the said district and available to that clerk to prepare and make certified copies of, on the order of any Circuit Court Judge or Justice of the Supreme Court. It seems off to your petitioner that a clerk of a District Court can be ordered to prepare certified copies of any and all records in his custody on any case and prepare them at government expense if so ordered; and
29 then to have a district attorney claim that there is no way to have a transcript of testimony in a criminal Capital case furnished to the Circuit Court of Appeals at government expense if the defendant happens to be a poor person.

Your petitioner respectfully submits that Section 262 of Title 28, U. S. C. A., Sect. 377, answers this claim of the U. S. District Attorney Clinton Barry. Answers it when it is called to the attention of the court that there is nothing in Section 832 of Title 28 U. S. C. A. that specifically or generally prohibits the transcript of testimony in a criminal capital case being furnished to a circuit court of appeals, at government expense for its use in determining whether or not a pauper defendant appellant has had justice rendered to him, on an affidavit in forma pauperis made by the defendant-appellant to the circuit court.

"Four"

Your petitioner again reiterates all the claims made in his petition for a rehearing and for a writ of certiorari, and swears that the testimony given at the trial and now available to be transcribed in the custody of the United States District Court for the Western District of Arkansas will verify every fact he has sworn to, will prove beyond a shadow of a doubt that no kidnapping ever occurred, will prove there was no intent, plan, thought, or scheme of committing a crime of kidnapping and will prove that your petitioner has been wrongfully convicted of a crime of kidnapping.

"Five"

With reference to that part of the government's response in which Assistant United States Attorney Thomas C. Pitts makes a sworn statement by affidavit that all the evidence and testimony was recorded in shorthand by Judge Lemley's secretary, John T. Williams, and at the conclusion of the trial was immediately available to the defendant (your petitioner), and is still available; your petitioner thinks this affidavit typifies the character and reveals the impudent attitude of the district attorneys handling of this case! What is the purpose of this affidavit? Manifestly it is to prove to this court that the District Attorney office is free from any censure, since the law has been observed to the letter. The testimony was available, and is still available to the defendant. Your petitioner prays that this court recall that no complaint on it has ever been raised on this point nor no complaint on it ever made by the petitioner.

The district attorn'y says in the response, in effect, "We do not deny the transcribed record will show that testimony which the petitioner swears will prove his innocence of the crime of kidnapping, but we will not allow that record to be opened to this court unless it is unlocked with a key which the petitioner does not have." The key is the price, the cost of the transcription of the testimony. Your petitioner being a poor person without any funds can only answer such an argument with a "prayer for justice," addressed to this Honorable Court.

"Six"

There are many statements in the government's response which are inconsistent with the facts of the case.

(A) The statement is made that Judge Lemley reduced the petitioner's sentence long after he had sentenced him, and reduced it on his own (Judge Lemley's) motion. The record shows

that your petitioner was sentenced on Feb. 6, 1941, to Seven Years, and on April 19, 1941, barely 72 days later, after your petitioner has written Judge Lemley a personal letter as a motion requesting him to set aside the sentence, the 7-year sentence was reduced to five years. Your petitioner is attaching a letter from his attorney (former) to this answer marked "Exhibit A," which will verify this statement.

(B) The statement is made that "Judge Lemley was of the opinion that the evidence testified to by Government witnesses, if true, justified Miller's conviction * * *." This cannot be said to be the truth for it can be disproven by Judge Lemley's comments at imposition of sentence. Judge Lemley spoke thusly:

"There is a doubt in my mind of you having any criminal intent (of kidnapping) at the time you went after the girl, however, you probably were guilty of abuse." And further, the Judge continued:

"Mr. John E. Harris, here, assistant United States Attorney wants you to have 9 years, so those children will be free of your jurisdiction, however, I am not going to give you that much time, for we do not have any record of you being cruel to your children, so I am not going to give you 9 years. Seven years is a long time, is a long, long time, and 5 years is too, but I understand Mr. Harris will not approve your application for a parole, however, you will have some good-conduct time coming to you for good behavior, and I am not going to attempt to take it away from you, so I will give you 7 years."

The above language of Judge Lemley's is almost verbatum to the best of your petitioner's recollection. It proves there was a doubt in the mind of the trial judge that your petitioner was guilty of the crime of kidnapping.

(C) The statement is made in the Response that:

"The defendant's counsel was of the opinion that substantial evidence of defendant's guilt had been heard by the jury, and that no good purpose could be served by attempting to
31 argue to the Circuit Court of Appeals that the court should believe Miller's practically unsupported statements as against the well-corroborated evidence of the government, consequently they decided not to attempt to secure a reversal on that ground."

Your petitioner's answer to this statement is that it is a very viscious misconstruction of the truth.

(1st) The point that the "evidence did not sustain the verdict," was first voiced by your petitioner's counsel as soon as the jury returned the verdict, and was believed by them so strongly

that they gave a newspaper reporter a long statement to that effect, and it was published in the "Texarkana Paper" the day after the jury returned the verdict. Your petitioner's trial lawyers told him that they were positive they could show the Circuit Court of Appeals that the "Evidence did not support the verdict," and secure his acquittal on that point alone if the petitioner could raise the money to have the testimony transcribed into a record on appeal. But if he could not raise the money for transacting the testimony then it would be impossible to bring that question up on appeal before the Circuit Court of Appeals.

(2nd) Naturally if the point that the "Evidence did not support the verdict" was brought before the Appellate Court without a complete transcript of the testimony then Miller's claim would be practically unsupported and without a chance of proof, but the district attorney's in their response attempt to have this Honorable Court believe, by sly innuendo, that your petitioner's trial attorney's would not attempt to raise this point because they thought there was no merit in it.

Your petitioner pleaded with his attorneys to raise the question before the Appellate Court that the "Evidence did not support the verdict" many times orally and by letter, but always received the same answer from them to wit: "It is impossible to raise this question without a transcript of the testimony to verify it, and since you cannot raise the money to pay for a transcript, we can not bring it to the attention of the Appellate Court." Your petitioner is attaching two letters from his attorney to this answer as Exhibits B and B-1, which will verify this statement.

"Seven"

In reference to the statement in the response (after a resume of the steps taken and made by the government employees, officials, and jurymen) that "The defendant by his unsupported statement seeks to overturn the whole sequence of events by which his conviction was secured."

32 Your petitioner's answer to this to again call this Honorable Court's attention to the fact that nowhere in the government's response is there a denial that the transcribed testimony will show every fact, that is set out in the petitioner's petition, to be positively true. That is the best answer; the district attorney knows that a copy of the transcribed testimony will prove to this court that your petitioner was wrongfully convicted of the crime of kidnapping, but he does not wish to have to admit to the embarassing fact that his office has had a hand in sending an absolutely innocent man to the penitentiary for a wholly non-committed crime.

Your petitioner contends that the district attorney seemingly is trying to convince this court that a "guilty verdict" returned by a jury is always to be taken then and there as positive proof of a defendant's guilt. The fallacy of such a conclusion is dispelled by the fact that there is a "Court of Appeals" over every district court in this land and your petitioner has been informed that during the year of 1941 there were over 3,000 cases appealed from the district courts to the Ten Circuit Courts of Appeal of the Nation.

"Nine"

Your petitioner wishes to inform this court that as soon as he received a copy of the "Order of this Court" of January 19, 1942, he wrote to all the witnesses who testified in his case in his trial whose addresses he could remember, and asked them to send affidavits to him as to what their testimony was so he could attach them as exhibits to this answer proving in a ex parte fashion all the allegations of his petition. Up to the date of the typing of this answer, he has received only one reply out of the six requests he made, and the petitioner is attaching this affidavit and true copies of it, of witness D. M. McClure.

"Ten"

Your petitioner humbly prays this Honorable Court will forthwith order the transcribed testimony be prepared at government expense, and in "question and answer form," verbatum just as it was given by the witnesses. Your petitioner believes testimony prepared in the "Narrative Form" may lose the original meaning put into the answers by the witnesses, and this Court would not get the true answers. Nearly all of the witnesses were poor, uneducated people and their language is not the language of lawyers and court employees such as a secretary to a Judge and language of a District Attorney.

33 "Eleven"

Your petitioner, thanking this Honorable Court for your bearing with him in this probably cumbersome answer to the government's response again swears he has never had any intent of, has never made any attempt to, and has never kidnapped anyone in his life, and that no crime of kidnapping at all has ever occurred in this case, and that the transcribed testimony will show this court that such is the truth, and that he has now been in prison nearly 13 months for the alleged commission of a crime that no person has committed at all.

Your petitioner respectfully request that this Honorable Court issue the necessary order or writ which will allow Justice to be done to him under the law, so he can be discharged from his wrongful imprisonment forthwith.

This answer is respectfully submitted by,

JESSIE W. MILLER,
Jessie William Miller,
Appellant-Petitioner.

34 In the United States Circuit Court of Appeals, 8th Circuit

[Title omitted.]

Jessie William Miller, before me this day, March 3rd, 1942, makes the necessary oath and deposes as follows:

He is familiar with the contents of this above answer and says every fact therein alleged is true to the best of his belief and knowledge; that he again states he is impoverished and has no property or money with which to pay costs, or employ an attorney and that he believes it necessary that he should have counsel in his pending case; therefore he prays the appointment of counsel by this Court to present his cause herein, if necessary. Also he believes his cause is meritorious and that he should be granted the relief which he seeks by his petition in this court. And for such petition, Jessie William Miller will ever pray.

JESSIE W. MILLER,
Petitioner.

STATE OF KANSAS,
County of Leavenworth, ss:

Sworn to and subscribed before me this 3rd day of March A. D. 1942.

GEORGE D. EBERSTEIN,
Notary Public.

My commission expires May 8, 1944.

35 *Exhibit A to answer*

(Under Heading No. 6)

Philip G. Alston

Attorney-at-law

TEXARKANA, ARKANSAS, *April 19, 1941.*

J. W. MILLER, PMB 58098,
Leavenworth, Kansas.

DEAR BILL: Your letter to Judge Lemley was received by him yesterday, and after some discussion of the matter between him,

myself, and the government attorney's, he decided that a term of seven years was a little bit too steep under the circumstances.

He entered an order, therefore, as of today reducing your sentence to a period of five years. This reduction, it seems to me, will serve as far as you are concerned the same purpose of an appeal of your case, as a matter of fact it probably will be better for you, and I suggest therefore that you allow me to dismiss the appeal.

As I told you before you left here, you have just got a term to serve, and the only question was whether or not it would be seven-year term or a five-year term. Speaking frankly, I don't think that even if you won your appeal, that you would ever be any better off than you are now, and you might possibly be worse off.

Please let me know at once whether or not you desire me to dismiss your appeal in accordance with the advise contained in this letter.

Very truly yours,

(s) PHIL G. ALSTON.

36 *Exhibits BE to answer*

Philip G. Alston
Attorney-at-Law

TEXARKANA, ARKANSAS, *September 29, 1951.*

JESSE WM. MILLER, PMB 58098,
Leavenworth, Kansas.

Re: J. W. Miller, Appellant v. U. S. No. 11958

DEAR BILL: Your case has been taken under advisement by the Circuit Court of Appeals, and I expect a decision within the next few days. I have very little hope, however, that your case will be reversed: Mr. Pitts, who argued the case for the government, told me a day or so ago that all the Court seemed to be interested in was whether or not you stood in loco parentis to Dorothy; that means whether or not she was actually a member of your family before the Texas trip; you know the answer to that question as well as I do.

As I have explained to you before, it was not possible to raise the question of sufficiency of the evidence upon which you were convicted; the only question raised was whether or not the jury should have been allowed to pass on the age of Dorothy.

You talk about taking this case to the Supreme Court of the United States; that is not as easy as it sounds, and I am not at all sure that the court would grant a writ of certiorari to review it. I will tell you now, however, that unless I am paid a sub-

stantial fee I would not be interested in carrying the case further. In the case of Gooch v. U. S. the Supreme Court indicated what it thought about the statutory exception as to parents, and I think you would be wasting time and money to even try to take the case there.

Sincerely yours,

(s) PHIL G. ALSTON.

37 [Copy]

Exhibit B–1 to answer

PhiliOp G. Alston
Attorney-at-law

TEXARKANA, ARKANSAS, *June 2, 1941.*

J. W. MILLER, PMB 58098,
Leavenworth, Kansas.

In Re: Jesse William Miller, Appt. vs. U. S.

DEAR BILL: Yours of May 28, received and contents noted. In regard to your appeal generally I may state that the brief is being prepared and will be filed within the time allowed by law.

And as has been explained to you before, it will be impossible for us to go into the merits of your case on the appeal. The only question which can be considered by the Circuit Court of Appeals is whether or not you are entitled to the benefit of the part of the statute excepting parents who kidnap their minor children. For this reason affidavits in regard to whether or not you kidnaped Dorothy would not even be read by the court, and sending such affidavits up there would probably hurt you a good deal, and would not help you at all.

The only thing for you to do is to wait and see what happens; it is possible that your case may be heard in September, but I do not know. I know it is hard for you to sit quietly during the pendency of proceedings which mean so much to you, but that is the only thing for you to do. I am doing everything possible for you, and all we can do is to hope and pray that the Circuit Court of Appeals will see the thing the way we do.

Very truly yours,

(s) PHIL G. ALSTON.

38 *Affidavit of D. M. McClure*

To whom it may concern:

I, D. M. McClure, Sherman, Texas (filling station and auto salvage as occupation).

Gives this as a true statement, to the best of my knowledge and ability of which I gave in the kidnaping Case at Texarkana, Ark., on or about February 10th A. D. 1941.

An quote:

"My business are locakated on highway #75 at the edge of Sherman, Tex., an wher' Jessie W. Miller an family lived for about four months in som' t'urist cabbins, an within 125 feet of my place. An wher' I seen them ever day, an talked to som' of the groop, an seen Dorothy Garner, likewise. Also seen her pas' my place goin' towarge town nombers of times, an seen her at home when the rest of the family wer' away, an at no time did I see or hear anything goin' 'rong an I seen an talked to Dorothy Garner just a fue minutes before she left. An at no time did she mention of bein' fooled or leared or kidnaped away from her home. An to my knowledge she had full discrission to do so."

(s) D. M. McClure.

Sworn and subscribed before me this 20th day of February 1942.

(s) Juniata Beach,

Notary Public for Grayson County.

My Commission expires June 1, 1943.

[File endorsement omitted.]

39. In United States Circuit Court of Appeals, Eighth Circuit

No. 11958—March Term, A. D. 1942

Jessie William Miller, appellant

vs.

United States of America, appellee

Appeal from the District Court of the United States for the Western District of Arkansas

Before Sanborn and Johnsen, Circuit Judges, and Nordbye, District Judge

Opinion

March 25, 1942

Per Curiam: This Court on November 25, 1941, affirmed the conviction of the appellant. 123 F. 2d 715. Thereafter the appellant, who is without funds and has entered upon the execution of his sentence, filed applications praying (1) for the appointment

of counsel to conduct further proceedings on his behalf, and (2) for an order directing that, at the Government's expense, a full and complete transcript of all of the testimony taken at the trial be sent to this Court to enable it to review and reconsider this case. The appellant had presented only one question for decision, and his record on appeal was insufficient to enable this Court to determine other questions if they had been presented.

40 Since in Holmes v. United States, — U. S. —, 62 S. Ct. 357, the Government had consented to the vacation of a judgment of affirmance entered by this Court (see 115 F. 2d 528) in a case where the record on appeal contained no bill of exceptions and was insufficient to enable this Court to determine the questions presented for decision, we considered it advisable, in the instant case, to ascertain whether the Government desired to consent that the case might be reopened to enable the appellant, Miller, to have a complete review. We therefore made an order requesting that the Government make response to the applications of the appellant, and affording the appellant an opportunity to reply to the response of the Government. (See 124 F. 2d 849.) The Government has made its response, in which it seeks to distinguish the situation in the Holmes case from the situation in this case, and states that it could not lawfully pay or be compelled to pay for a bill of exceptions in this case, and that the appellant had the opportunity to procure a complete record on appeal had he desired to do so. The Government indicates that it does not propose to consent to the vacation of the judgment of this Court or to a reopening of this case.

Whether there is a distinction between the Holmes case and the present case, we do not regard as important. What we were concerned about was whether the Government proposed to consent to a vacation of the judgment of this Court in this case and to a reconsideration and rehearing. This Court has decided the only question which was presented and which, upon the record, it had jurisdiction to decide, and we are convinced that it decided that question correctly. The only judgment which could have been entered was entered, and the case is ended so far as this Court is concerned. If further proceedings are to be con-

41 ducted by the appellant, they must necessarily be conducted in the Supreme Court of the United States. We are, therefore, of the opinion that the appellant, if he intends to proceed further, should apply to that Court for such relief and assistance as he may consider himself entitled to. He is granted leave to withdraw any of the original documents presented by him to this Court in connection with his applications for the appointment of counsel and for a complete transcript of the evidence.

If any further proceedings taken by the appellant in the Supreme Court result in any liability for Clerk's fees or costs in this Court, he, as a poor person, is relieved of the obligation to pay such fees or costs.

The applications of the appellant are denied.

128 Supreme Court of the United States

Order granting motion for leave to proceed in forma pauperis

June 8, 1942

On consideration of the motion for leave to proceed further herein in forma pauperis,

It is ordered by this Court that the said motion be, and the same is hereby granted.

129 Supreme Court of the United States

Order allowing certiorari

Filed June 8, 1942

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1942

FILED
NOV 14 1942
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 76

JESSIE WILLIAM MILLER,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR PETITIONER.

HOWARD C. WESTWOOD,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 76

JESSIE WILLIAM MILLER,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

BRIEF FOR PETITIONER.

Opinions Below.

No opinion was filed by the District Court. The opinion of the Circuit Court of Appeals for the Eighth Circuit affirming the judgment of conviction is reported at 123 F. (2d) 715 (R. 1-5). Its opinion accompanying its order that the Government answer the application of the petitioner for a rehearing is reported at 124 F. (2d) 849 (R. 9-10). Its opinion denying such application is reported at 126 F. (2d) 462 (R. 30-32).

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, 28 U. S. C. A. § 347. The petitioner's

application to the court below for a rehearing was denied March 25, 1942 (R. 30). The petition for writ of certiorari was filed April 21, 1942. The writ of certiorari was granted June 8, 1942 (R. 32).

Statement of the Case.

In the United States District Court for the Western District of Arkansas the petitioner was convicted of kidnapping in violation of 18 U. S. C. A. §408a. The person allegedly kidnapped was the illegitimate daughter of the petitioner's wife (R. 1).

At the trial the petitioner, represented by counsel appointed by the court, contended both that he had not taken or detained the daughter against her will (R. 13) and that he came within the exception of the statute which states that it does not apply to a kidnapping, "in the case of a minor, by a parent thereof" (R. 2). In brief on appeal, *in forma pauperis*, the only error urged by his counsel was the refusal of the trial judge to submit to the jury the question whether the daughter was a minor at the time of the alleged kidnapping and to instruct the jury that if she was a minor the petitioner should be acquitted (R. 2). On this point the Circuit Court of Appeals held that the word "parent" means one who, if not a blood parent, at least stands *in loco parentis*, and that the record disclosed no fact tending to establish the relation of parent and child at the time of the offense. While there was dispute whether, at the time of the alleged kidnapping, the daughter was over eighteen, she had, prior to that time, lived in the petitioner's household only for a brief period when she was an infant and at the time of the alleged kidnapping she had been married for about three years and was living with her husband (R. 1-2).

The Circuit Court of Appeals pointed out that the ap-

peal presented only the one question, and affirmed the judgment. 123 F. (2d) 715, 716, 718 (R. 2, 5).[1]

Thereupon the petitioner filed with the Circuit Court of Appeals, in person and not through counsel, a "Petition for Rehearing and Writ of Certiorari", asking that the trial court be directed "to have prepared at government expense, a full and complete record of all the testimony given in the case", and to forward the record to the Circuit Court of Appeals "for review and reconsideration" (R. 5). In support of this application the petitioner set forth facts as to the purport of the evidence at his trial indicating that the evidence would not sustain the conviction (R. 5-8).

The Circuit Court of Appeals, after stating that if the petitioner's statement of the case were true he was wrongfully convicted (R. 9), ordered that the Attorney General and the United States Attorney for the Western District of Arkansas be supplied with copies of the petitioner's application, that they answer it, and that the petitioner be afforded an opportunity to reply to their answer (R. 10). In entering this order the Court stated that ordinarily a decision of the only question originally presented on the appeal would end the case, but that, in view of the Supreme Court's action " 'on the Government's consent' " in *Holmes v. United States*, 314 U. S. 583 (1941), it seemed advisable to give the Government an opportunity to state its position respecting the petitioner's application so that, if it desired to consent to a reopening, "it may do so here, without subjecting the appellant to the unnecessary burden in such a situation of having to petition for certiorari, before the consent is granted". 124 F. (2d) 849 (R. 9-10).

The Government, by the United States Attorney, filed an answer refusing to consent to a reopening. It stated:

---

[1] Each of the Court's subsequent opinions likewise emphasized that the only question presented to it upon the record was that relating to the petitioner's parenthood.

(a) In this case the official court reporter reported the entire proceedings at the trial (*cf.* R. 38) so that a "transcript of the record was available to the appellant", whereas in the *Holmes* case only parts of the testimony had been taken down in shorthand and the Government consented to vacate the judgment after the case came to the Supreme Court only because it then was discovered for the first time that a bill of exceptions could be prepared (R. 12-13).

(b) The Government, under a ruling of the Comptroller General, 9 Comp. Gen. 503 (1930), is without authority to pay the cost of a transcript of testimony for an indigent defendant (R. 13).

(c) The petitioner had a fair trial and was found guilty upon substantial evidence (R. 13-14).

(d) The official court reporter who took down the testimony was the secretary to the trial judge. Under rulings of the Comptroller General it is not legal for the Government to pay a court reporter for a transcript if the reporter draws a salary as secretary to a District Judge, "* * * and the Court Reporter cannot be required to furnish a transcript of the evidence to the Government under these circumstances". Moreover it would be unreasonable to ask the reporter to furnish a transcript of the seven days' proceedings in this case and in view of the amount of other business pending in the District Court it would take the reporter "several months" to furnish it (R. 14).

(e) The petitioner's counsel was of the opinion that there was substantial evidence of the petitioner's guilt and therefore decided not to seek appellate review of the sufficiency of the evidence to sustain the conviction. The petitioner had able counsel; the petitioner was allowed to proceed *in forma pauperis* with no limitation on the number of

witnesses he was permitted to call at Government expense; and the case was fully investigated and fairly tried. In these circumstances the petitioner should be bound by the decision of his counsel not to seek appellate review on the ground in question (R. 14-16).

To this answer the petitioner filed a reply stating, among other things:

(a) In a criminal case, charging a capital offense, an indigent defendant should be furnished, without cost to him, with a transcript of evidence in order to make up the record on appeal—at least an appellate court should have power to require the furnishing of such a transcript in aid of its appellate jurisdiction to determine whether "justice has been done" (R. 21-22).

(b) The Government paid the reporter in this case for his work of recording the testimony in shorthand,[1] the notes should therefore be in the custody of the clerk of the trial court "available to that clerk to prepare and make certified copies of," in order that the appellate court may determine whether justice has been done, and there is nothing in the *in forma pauperis* statute, 28 U. S. C. A. §§ 832-836, preventing such action (R. 22).

(c) The petitioner, having no funds, is unable himself to pay the reporter to have the shorthand notes transcribed (R. 23).

(d) The petitioner's counsel informed him immediately after the verdict that they "were positive they could show

[1] The petitioner doubtless meant that he had not engaged the reporter to record the testimony and had not fully paid for this service. While performing this service the reporter was paid his regular salary as secretary to the trial judge. Appendix A indicates that in connection with the appeal the petitioner did pay the reporter something for his services in recording the testimony.

the Circuit Court of Appeals that the 'Evidence did not support the verdict'" if the petitioner could raise the money to have the testimony transcribed. The petitioner many times pleaded with his counsel to appeal on the ground of the insufficiency of the evidence, but each time they informed him that such an appeal was impossible because of his inability to purchase a transcript (R. 24-25).

Thereupon the Circuit Court of Appeals entered an order denying the petitioner's application. In its opinion the Court referred to the fact that the Government "seeks to distinguish" the *Holmes* case, states that it cannot lawfully pay for the transcript and that the petitioner had the opportunity to secure a complete record, and will not consent to a reopening. The Court concluded:

> "Whether there is a distinction between the Holmes case and the present case, we do not regard as important. What we were concerned about was whether the Government proposed to consent to a vacation of the judgment of this Court in this case and to a reconsideration and rehearing. This Court has decided the only question which was presented and which, upon the record, it had jurisdiction to decide, and we are convinced that it decided that question correctly. The only judgment which could have been entered was entered, and the case is ended so far as this Court is concerned. If further proceedings are to be conducted by the appellant, they must necessarily be conducted in the Supreme Court of the United States. We are, therefore, of the opinion that the appellant, if he intends to proceed further, should apply to that Court for such relief and assistance as he may consider himself entitled to."

Finally the Circuit Court of Appeals granted the petitioner leave to institute further proceedings in this Court without payment of fees or costs in the Circuit Court of Appeals. 126 F. (2d) 462 (R. 30-32).

In addition to the foregoing facts, certain additional events should be kept in mind in deciding this case.

On February 12, 1941, immediately after the verdict and sentence, a notice of appeal was filed in the trial court setting forth as grounds of appeal:

> "(1) That the court erred in refusing defendant's prayer for a *peremptory* instruction of not guilty, both at the conclusion of the Government's case and at the conclusion of all the evidence in the case. (2) That the court erred in admitting the testimony of Government witnesses whose names were not included in the list furnished to defendant two days before the trial. (3) That the court erred in refusing defendant's prayer for an instruction to the effect that if the jury found that complaining witness was under the age of eighteen years at the time of the kidnapping, they must find the defendant not guilty under 18 U. S. Code 408 (a). (4) That the verdict of the jury was contrary to the weight of the evidence" (R. 34).

This notice was signed by the petitioner's counsel and presumably a copy was duly transmitted to the Circuit Court of Appeals as required by Rule 4 of the *Rules of Criminal Procedure after Verdict.*

The same grounds of appeal were stated in the "Application for Appeal in Forma Pauperis" filed in the trial court on February 11, 1941, signed by the petitioner himself [1] (R. 33). This application was granted by the trial court on February 13, 1941 (R. 35).

The petitioner's counsel filed an assignment of errors in the trial court on March 10, 1941. This assignment,

[1] The petitioner also filed such an application in the Circuit Court of Appeals dated February 17, 1941, which set forth the same grounds of appeal. The record filed in this Court shows that this application was granted on March 3, 1941 (R. 35), but does not set forth this application. However, at the request of the petitioner's counsel the Clerk of this Court secured a copy thereof from the Clerk of the Circuit Court of Appeals and furnished it to counsel.

specifically recited only the error involved in the trial court's refusal to adopt the petitioner's contention that the petitioner would not be guilty if the person kidnapped was a minor, since the petitioner was her "parent". There was, however, a general prayer for reversal on account of this error and "other manifest errors" in the record, and a prayer "for such further orders • • • as are mete and proper in the premises" (R. 36-37).

The bill of exceptions, settled by the trial court in an order referring to it as agreed upon by the parties (R. 39), sets forth only so much of the transcript of testimony as would bear on the petitioner's alleged parenthood and the minority of the person allegedly kidnapped—the bill of exceptions does, however, show that there was a motion for a directed verdict, on the ground of the insufficiency of the evidence to prove guilt, both at the close of the Government's case (R. 37), and at the close of the whole case (R. 38).

The record does not show whether the trial court was made aware of the petitioner's desire for a record of all the evidence except insofar as the notice of appeal and the *in forma pauperis* plea set forth as grounds of appeal that the court should have granted the motion for a directed verdict and that the evidence did not sustain the verdict. To the extent that a complete record of the evidence is necessary to support these grounds of appeal, the trial court was on notice of the petitioner's desire. The petitioner also wrote the trial judge a personal letter, apparently received by the judge on April 18, 1941 (R. 27), which the petitioner describes "as a motion requesting him to set aside the sentence" (R. 24).[1] The judge thereupon did reduce the peti-

[1] Present counsel has tried to secure a copy of this letter. That there was such a letter is indicated not only by the petitioner's statement but also by the fact that it was referred to by the petitioner's former counsel in a letter to the petitioner telling him of the judge's action in reducing

tioner's sentence from seven to five years (R. 6, 24; *cf.* R. 16).

The Solicitor General's Memorandum in Opposition to the Granting of the Petition for Writ of Certiorari points out (at p. 4, n. 1) that the brief filed by the petitioner's counsel in the Circuit Court of Appeals stated that the petitioner would have assigned as error and contended that the verdict was not sustained by the evidence if he had been able to pay the reporter for transcribing the testimony so that it might be incorporated in the bill of exceptions. See *infra*, pp. 13, 14.

While the record does not definitely disclose the fact, it is understood that the petitioner was in jail at least from the time of his conviction, and that, on February 25, 1941, as a result of electing to commence the service of his sentence, he was committed to the federal penitentiary at Leavenworth, where he is now incarcerated.

Summary of the Facts.

In summary, then, the case is this: A pauper defendant, in custody, desired to have appellate review of the question whether his conviction was sustained by the evidence. He pleaded with his counsel, who had been appointed to defend him, to present this issue. The issue was presented in the notice of appeal. But his counsel, despite their opinion that the issue was meritorious, informed him that they could not pursue the issue unless he could pay the official court reporter for transcribing the notes of the testimony. He could not do so and his counsel, for that reason, limited the bill of exceptions and the brief before the Circuit Court

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his sentence after receiving the letter (R. 27-28; see also Appendix A. hereto). However the petitioner has informed his present counsel that he does not have a copy of the letter, and the secretary to the trial judge has written present counsel stating that he cannot find this letter in the judge's files.

of Appeals to other issues. After that Court's decision on such other issues, he personally, and not through counsel, petitioned that Court to reopen his case and to have a complete record of all the evidence furnished, without cost to him, for the purpose of review to determine its sufficiency to sustain the verdict. The Government refused to consent to a reopening. The Circuit Court of Appeals then denied the petition to reopen on the sole ground that it had no jurisdiction, without the Government's consent, to deal with any question other than the one presented in the bill of exceptions.

Summary of Argument.

I. A Circuit Court of Appeals has jurisdiction upon the filing of a notice of appeal to take whatever action may be appropriate to assure that a defendant has been justly treated, regardless of the scope of the bill of exceptions.

II. The petitioner has not waived his right to a record adequately presenting the issues of which he desires appellate review. Even if a transcript could not be furnished him without cost, he had a right to have a record made up in some other way. It was the responsibility of the lower courts, the district attorney and the counsel appointed to represent him to see to it that he secured a record. The petitioner himself asserted his rights as fully as could be expected.

III. The trial court had the power to furnish the petitioner with a transcript of testimony without cost to him. The power to afford such assistance to an indigent defendant in a criminal case is inherent in a trial court and no Act of Congress has destroyed it. Moreover, Congress has granted, or recognized, the power to afford such assistance in the *in forma pauperis* statute, 28 U. S. C. A. §§ 832-836. And not only is the appropriation for miscellaneous

expenses of the United States courts generally available to meet the cost of such a transcript, but there is now a specific item in that appropriation for this very purpose. Public No. 644, 77th Cong., 2d sess., c. 472, Title IV; UNITED STATES CODE CONGRESSIONAL SERVICE, No. 7, p. 752 (1942).

IV. Even if the courts generally have no power to aid the indigent by furnishing a transcript without cost, this case should be remanded with instructions to the trial court requiring the preparation of a bill of exceptions on the issues of which the petitioner desires appellate review. Since the secretary to the trial judge took the shorthand notes of the testimony and, in view of rulings of the Comptroller General, could not legally be paid either by the Government or the petitioner for transcribing them, the most appropriate course in this particular case would be for the trial judge to order his secretary to make a transcription from which the bill of exceptions could be made up.

V. Whether or not it is necessary to a decision of this case to determine whether a transcript may be furnished to a pauper without cost to him, it is desirable that this Court announce the correct view of the matter in order that further erroneous rulings of lower courts may be avoided. It is time that the practice in United States courts be brought into line with prevailing conceptions of responsibility toward the poor.

ARGUMENT.

I.

The Circuit Court of Appeals Had Jurisdiction to Pass on the Merits of the Petitioner's "Petition for Rehearing".

The Circuit Court of Appeals erred in holding that it had no jurisdiction to pass on the merits of the "Petition for Rehearing".

The notice of appeal included as grounds of appeal the points of which the "Petition for Rehearing" sought appellate review. Thereupon, under Rule 4 of the *Rules of Criminal Procedure after Verdict*, the Circuit Court of Appeals had full power at any time to take any necessary action to assure a proper record and just treatment of the petitioner. *Ray* v. *United States*, 301 U. S. 158 (1937); *Forte* v. *United States*, 302 U. S. 220 (1937); *Kay* v. *United States*, 303 U. S. 1 (1938); *Ross* v. *United States*, 102 F. (2d) 113 (C. C. A. 9, 1939); *Boykin* v. *Huff*, 121 F. (2d) 865 (App. D. C., 1941). Even though the appellate court is confronted with no contention respecting the inadequacy of the record until a petition for rehearing, its jurisdiction remains unimpaired. This is demonstrated by the *Forte* case, where this Court held:

> "In this instance, had the question been raised *in limine*, the Court of Appeals would have had power to determine what the interests of justice required and it lost none of that power by reason of the fact that the question was not brought to its attention until the court had heard argument and reached a decision upon the assumption that the bill of exceptions was properly before it." 302 U. S. at 223-224.

II.

The Petitioner's Right to an Adequate Record Has Not Been Waived.

Nor can it be held that the petitioner has waived his right to a record reflecting the issues stated in his notice of appeal.

The Government's answer to the petitioner's "Petition for Rehearing" asserted that the petitioner's counsel failed to pursue the issue that the evidence did not support the verdict because of their belief that the point was insubstantial. However, as we shall see, this statement was not

accurate. In any event, for the purpose of this proceeding, the petitioner's own statement of the facts must be taken to be true. *Cf. Cochran* v. *Kansas*, 316 U. S. 255, 257 (1942).

The petitioner's reply to the Government's answer shows that his counsel assured him that the appellate court would reverse on the ground that the verdict was not supported by the evidence; that the petitioner many times "pleaded with his attorneys" to raise the question but that they did not do so; and that they informed him that it was impossible for them to do so because of his inability to pay for a transcript of the testimony (R. 24-25). The verity of these statements is borne out by letters to the petitioner from his attorneys written during the summer of 1941, and attached to his reply to the Government's answer (R. 28-29). And a letter from the same counsel to the petitioner's present counsel, appearing in Appendix A hereto,[1] further confirms the fact. Moreover the petitioner's counsel, in the brief before the Circuit Court of Appeals, stated:[2]

> "After conviction and sentence, the Appellant filed his notice of appeal, setting out several grounds therefor, among (them) being that the verdict of the jury was contrary to the law and the evidence and was not supported by the evidence. Unfortunately, the poverty of Appellant precludes him from presenting that point to this Court because he was unable to raise funds sufficient to pay the Court stenographer for transcribing

[1] The petitioner's former counsel has given present counsel permission to submit this letter to this Court.

[2] This statement in the brief on behalf of the petitioner is referred to at p. 4, n. 1, of the Solicitor General's *Memorandum in Opposition to the Granting of the Petition for Writ of Certiorari*. The Solicitor General has a copy of the brief and the Clerk of the Circuit Court of Appeals has sent present counsel for the petitioner one of the copies filed in that court. The statement quoted appears at p. 2 of the brief. Later in the same brief, at p. 21, after referring to the fact that the jury found that the petitioner had kidnapped the complaining witness, the petitioner's counsel stated:

> "As the Appellant has been unable to challenge the correctness of this finding, he must argue, during this appeal, on the assumption that such finding was correct."

all of the voluminous testimony so that it might be incorporated into his bill of exceptions. It is only fair to say, however, that the evidence adduced by the Government on the point of the actual kidnapping was very slight. Appellant concedes, however, that under the circumstances he must forego the urging of the possible incorrectness of the Jury's findings."

Thus it is perfectly clear that the petitioner's counsel refrained from pressing the grounds of appeal in accordance with the petitioner's desires only because of their belief that the petitioner's inability to purchase a transcript made it impossible, and not because of a belief that the case lacked merit.

So far as the petitioner himself is concerned, he did not sleep on his rights. He pleaded with his counsel repeatedly to pursue the appeal on the ground that the evidence did not sustain the verdict (R. 25). When informed that his inability to buy a transcript made this impossible, he sought to present affidavits to the appellate court on the question whether he kidnapped his wife's daughter. (R. 29; see also Appendix A hereto.) He urged his counsel to argue in their brief the question of the sufficiency of the evidence. (See Appendix A hereto.) He wrote the trial judge a letter "as a motion requesting him to set aside the sentence" (R. 24).[1] More could hardly be expected of a poverty stricken and ignorant[2] cotton picker, deprived of his liberty, with counsel assigned to represent him.

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[1] See *supra*, p. 8, n. 1.

[2] The petitioner's education and knowledge of legal rights are not accurately reflected by the literacy and ability displayed in his papers filed with the Circuit Court of Appeals and with this Court. Despite the fact that these papers were filed over his own name they were obviously prepared by someone else. A more accurate picture of the petitioner is given by two of his letters to the trial judge, one written just after his conviction, while he was in jail, and the other written several weeks later, from Leavenworth. Copies of these letters were sent to present counsel by the secretary to the trial judge at the direction of the trial judge, and are set forth in Appendix B hereto.

Whether or not the petitioner was entitled to a transcript of the testimony without cost to him, he was entitled to a bill of exceptions which would set forth the evidence in the case. No rule requires that the evidence be set forth in transcript form. Even the express requirement of Rule 75(b) of the *Rules of Civil Procedure*, that where a civil trial is stenographically reported the appellant must supply a copy of the reporter's transcript gives way to a pauper; he may present a record in some other form. *Hall v. Gordon*, 119 F. (2d) 463 (App. D. C., 1941); *Middleton v. Hartford Accident & Indemnity Co.*, 119 F. (2d) 721 (C. C. A. 5, 1941).

Someone, the petitioner's counsel, the district attorney, or the trial court, should have seen to it that the petitioner's rights were protected.

The notice of appeal put the trial court on notice of the petitioner's desire to have appellate review of the sufficiency of the evidence to sustain the verdict. Moreover the one document that had to be signed by the petitioner personally, his petition to proceed on appeal *in forma pauperis*, filed with and granted by the trial court, disclosed this ground of appeal.

Rule 7 of the *Rules of Criminal Procedure after Verdict* provides:

> "The clerk of the trial court shall immediately notify the trial judge of the filing of the notice of appeal, and thereupon the trial judge shall at once direct the appellant or his attorney, and the United States Attorney, to appear before him and shall give such directions as may be appropriate with respect to the preparation of the record on appeal, *including directions for the purpose of making promptly available all necessary transcripts of testimony and proceedings.* * * *" (emphasis supplied).

This Rule places an affirmative duty on the trial court. The extent of this duty is emphasized by the very different

provision in the Rule applicable to civil cases. Rule 75 (a) of the *Rules of Civil Procedure* provides:

> "Promptly after an appeal to a circuit court of appeals is taken, the appellant shall serve upon the appellee and file with the district court a designation of the portions of the record, proceedings, and evidence to be contained in the record on appeal."

The contrast between the civil Rule and the criminal Rule is striking. Whereas in civil cases the initiative is with the appellant, in criminal cases, under Rule 7, initiative is placed on the trial judge. As one court has recently said with specific reference to this Rule:

> "The initiative in many of these matters, especially in those relating to preparation of the record, is placed upon the judge or the clerk of the trial court." *Boykin* v. *Huff*, 121 F. (2d) 865, 873 (App. D. C., 1941).

The duty of a trial court to issue the proper directions under this Rule becomes particularly important where the defendant is charged with a heinous crime, where he has been represented by counsel whom the court itself has appointed, and where he is both a pauper and ignorant. The court's responsibility in such circumstances cannot be discharged simply by appointing counsel. See *infra*, p. 19.

The present record does not disclose what, if anything, was done by the trial court under Rule 7. But it seems apparent that if anything had been done it would have immediately disclosed to the court the petitioner's plight. Not only his counsel, but the district attorney as well, knew of the situation, for the former had consulted the latter, along with the court reporter who was the trial judge's secretary, concerning the availability of a transcript. (See Appendix A hereto.) And it should be as much the duty of the district attorney as of the petitioner's counsel, in a case of this kind, to see to it that the trial court is fully

informed and that proper steps are taken to protect the rights of a pauper. As this Court said in *Berger* v. *United States*, 295 U. S. 78, 88 (1935):

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer."

See also *Griffin* v. *United States*, 295 Fed. 437, 439 (C. C. A. 3, 1924); *State* v. *Osborne*, 54 Ore. 289, 296, 103 Pac. 62, 65 (1909).

It would, of course, have been a simple matter to have seen to it that the record which the petitioner's appeal called for was properly prepared. The trial court's own secretary was available to testify from his notes concerning the evidence. In fact, in the absence of a court reporter it would have been the trial court's responsibility, by making such notes as might be necessary, to retain a clear recollection of what transpired at the trial for the purpose of settling a bill of exceptions. As the court said in *In re Bills of Exceptions*, 37 F. (2d) 849, 851 (C. C. A. 6, 1930):

> "Settling a bill of exceptions is inherently and historically the personal act of the trial judge. Originally it was done, either as to each ruling at the time the ruling was made, or very soon after the trial. It depended upon the memory of the trial judge, as aided by his notes * * * but the settling continues to be the personal act of the trial judge, depending upon his memory and such aids as there may be."

Where his own secretary took down everything in shorthand there is no reason that the judge himself could not

have ordered his secretary to transcribe the notes, or substantial parts of them, in order to secure the record to which the petitioner was entitled.

In other words, all that was needed here, to protect the petitioner, was a minimum of cooperation between the trial court, his own secretary, the district attorney, and the petitioner's counsel.

In the Circuit Court of Appeals, too, there was oversight of the petitioner's rights. There, as in the trial court, he filed, on February 17, 1941, a petition to proceed *in forma pauperis*, signed by himself personally, which disclosed the ground of appeal he wished to urge.[1] There, too, a copy of his notice of appeal was filed. Rule 4 of the *Rules of Criminal Procedure after Verdict*. Finally his counsel's brief explained, in terms, that the only reason for the failure to present a bill of exceptions adequate to the grounds of appeal was the petitioner's inability to buy a transcript. *Supra*, p. 13. While his counsel did not argue the case in person (R. 28),[2] a simple inquiry from that court would have disclosed the situation and led to prompt steps either there or through orders to the trial court to secure a bill of exceptions.

With these failures to protect him on the part of the agencies of justice, it is difficult to see how the petitioner could have been more diligent in asserting his rights. A defendant of much more education and sophistication in *Boykin* v. *Huff*, 121 F. (2d) 865 (App. D. C., 1941), was even less diligent but was finally given redress. There, after conviction of pandering, a defendant had filed a notice of appeal, in the form of a personal letter to the trial judge. The judge, in ensuing correspondence with him, failed to make it clear that the defendant could appeal *in propria*

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[1] See *supra*, p. 7, n. 1.

[2] The petitioner's former counsel has written present counsel confirming the fact that no one argued the case in the petitioner's behalf.

persona, leaving the defendant with the impression that he had to secure counsel. Apparently he was unable to do so. In any event he did nothing toward perfecting and prosecuting an appeal. Two years or more later, on review of a decision denying his petition for writ of habeas corpus, the appellate court held that the remedy by appeal remained available and that the appellate court would see to it that his right to appeal would be assured. The defendant in that case, as his letters, quoted in the court's opinion, show, was extremely literate and knew that he had a constitutional right to have counsel or to represent himself—yet his failure to prosecute his appeal for some years did not forfeit his right to an appropriate bill of exceptions.

Appointed counsel is an agency of the court.

> "By the common law, prisoners indicted for felonious crimes were not allowed counsel before juries, but only before the court on questions of law, the judge taking upon himself theoretically the management of his defense in court during the progress of the trial. Here the court have power to assign counsel to perform the service they would otherwise feel bound to take upon themselves. He is thus a sort of substitute for themselves, and his omissions should be viewed by the court, in the exercise of its discretion in granting or refusing new trials, more favorably than if he had been employed by the prisoner himself for his defense." *State* v. *Williams,* 9 Houst. 508, 528, 18 A. 949, 951 (Dela., 1890); *cf. People* v. *Blevins,* 251 Ill. 381, 390, 96 N. E. 214, 218 (1911).

In a very real sense, therefore, when the petitioner's counsel informed the petitioner that it was impossible to present a question on appeal because of his inability to buy a transcript, it was as though the court itself had so informed him. In any case, the rule that a client is bound by his attorney's decisions as applied in a civil case, *Sutherland* v. *Round,* 57 Fed. 467 (C.C.A. 6, 1893), must be applied very

differently in a criminal case, *Hannon* v. *United States*, 99 F. (2d) 933 (C.C.A. 3, 1938); *People* v. *Nowak*, 372 Ill. 381, 24 N. E. (2d) 50 (1939); *People* v. *Gardiner*, 303 Ill. 204, 135 N. E. 422 (1922); *People* v. *Schulman*, 299 Ill. 125, 132 N. E. 530 (1921), and where a capital crime is charged, with counsel appointed by the court because of the defendant's poverty, special care must be taken to assure that every right of the defendant is fully protected despite any waiver or neglect of those rights by his counsel. *Johnson* v. *United States*, 110 F. (2d) 562 (App. D. C., 1940).

III.

The Trial Court Had Power to Furnish a Transcript of Testimony, in Order to Make up a Record, Without Cost to the Petitioner.

A. *A Trial Court Has Inherent Power to Provide Such Assistance to a Pauper Defendant in a Criminal Case.*

1. In Forma Pauperis Relief is Not Dependent upon Statutory Provision Therefor

The books contain abundant recognition of the inherent power of a court to afford *in forma pauperis* relief entirely apart from any statutory provision therefor.

The statute of 11 Henry VII, c. 12, 4 Great Britain Statutes at Large (Cambridge ed. 1763) 60 (1494), was the first legislation in England on the subject of *in forma pauperis* relief; it provided that plaintiffs might sue civilly without payment for writs and that attorneys might be assigned to serve without fee.[1] This statute, however, has been held to be merely declaratory of the pre-existing common law. *Brunt* v. *Wardle*, 3 Man. & G. 534, 133 Eng.

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[1] The statute of 23 Henry VIII, c. 15, 4 Great Britain Statutes at Large (Cambridge Ed. 1763) 244 (1531), relieved paupers of costs.

Rep. (full reprint) 1254 (1841); *Martin* v. *Superior Court*, 176 Cal. 289, 168 Pac. 135 (1917); *Majors* v. *Superior Court*, 181 Cal. 270, 184 Pac. 18 (1919); Note, *Proceedings in Forma Pauperis*, 31 HARV. L. REV. 485 (1918); Note, *Forma Pauperis Suits in California*, 27 Cal. L. Rev. 352 (1939); Annotation, 6 A. L. R. 1281. There is other very respectable evidence that long before Henry VII's Parliament took the foregoing action, English courts found means, without benefit of statute, for providing justice to the poor. Maguire, *Poverty and Civil Litigation*, 36 HARV. L. REV. 361, 363 *et seq.* (1923); I Pollock and Maitland, HISTORY OF ENGLISH LAW 195 (2d ed., 1898). And, though Parliament had limited its statute to the common law courts, equity, ecclesiastical and probate courts have provided their own *in forma pauperis* relief. Maguire, *op. cit. supra*, at pp. 365 *et seq.*; Annotation, L. R. A. 1918 B, 319, 320. Moreover, while Parliament had not referred to appeals, in *Bland* v. *Lamb*, 2 Jac. & W. 399, 402, 37 Eng. Rep. (full reprint) 680, 681 (1820), Lord Eldon is reported to have said, in a civil case involving the construction of a will,

> "• • • it was a very singular proposition that a pauper could not appeal. He could not see why, because a party was poor, the Court should not set itself right."

Whatever may be the law with respect to civil litigation, there is the clearest possible ruling by Lord Hardwick in *Rex* v. *Wright*, Cas. T. Hard, 253, 95 Eng. Rep. (full reprint) 162 (1736), respecting a court's inherent power to extend *in forma pauperis* relief in a criminal case. There a motion for permission to defend as a pauper an indictment for conspiracy was first denied. Cas. T. Hard. 211, 95 Eng. Rep. (full reprint) 136. At the next term, however, the motion was renewed and ten instances were cited

in which this relief had been granted. In the course of a careful examination of the question Lord Hardwick said:

> "Now when this matter was first moved, and it was taken to arise upon the statute of (11) Hen. VII (c. 12), there appeared to me to be no manner of ground for it, and (without doubt there is no ground for it) upon that statute; but now it is put upon another foundation, that it has been the course of the Court to admit defendants in forma pauperis, and if it has been so, it ought to be adhered to. Though there are no late precedents, yet those produced seem to be extremely strong, that the Court has a discretionary power to do it." Cas. T. Hard, 254, 95 Eng. Rep. (full reprint) 163.

That this continued to be the practice at common law is demonstrated by such cases as *Brunt* v. *Wardle*, 3 Man. & G. 534, 544, 133 Eng. Rep. (full reprint) 1254, 1258 (1841), where Maule, J., said:

> "The statute of 11 H. 7 does not, in terms, extend to criminal proceedings; and yet it has been the practice of the Court of Queens Bench to admit parties to defend indictments in forma pauperis, which could only be done by action of its common law authority."

In the United States, likewise, there has been a very general—though not unanimous—recognition of a court's power, quite apart from statute, to grant *in forma pauperis* relief.

Martin v. *Superior Court*, 176 Cal. 289, 168 Pac. 135 (1917), contains one of the more thorough opinions on the subject. There, the plaintiff in a tort case sought to proceed *in forma pauperis*. There was no *in forma pauperis* statute. The defendant therefore urged that fees had to be paid, and argued that the early English *in forma pauperis* statutes had not been received as a part of the common law. The court rejected the latter argument, but then went on to hold:

"But, quite independently of this determination, there is still the controlling fact that the power of the English common-law courts to remit fees on petition in forma pauperis did not have its origin in any statute, but was in fact exercised as one of the inherent powers of the courts themselves, quite independently of statute. And this one would naturally expect to find, since, imperfect as was the ancient common-law system, harsh as it was in many of its methods and measures, it would strike one with surprise to be credibly informed that the common-law courts of England shut their doors upon all poor suitors who could not pay fees, until Parliament came to their relief. Even greater would be the reproach to the system of jurisprudence of the state of California if it could be truly declared that in this twentieth century, by its Codes and statutes, it had said the same thing, and yet this is precisely the position which respondents to this application take." 168 Pac. at p. 137.

After a review of the English decisions, and after pointing out historical mistakes in certain American decisions holding that *in forma pauperis* relief depended upon statute, the court went on to hold that its power to grant the relief sought existed apart from any statute and that the legislature, in general statutes requiring the payment of fees, had not negatived the court's inherent power to aid a pauper. The court said,

"Quite aside from the question as to the power of the legislature to do this thing, it is obvious that only the plainest declaration of legislative intent would be construed as even an effort to do this thing. We find no such expressed intent. All of the statutes dealing with the payment and prepayment of fees . . . are general in their nature, and have to do with the orderly collection and disposition of the fees, payment or prepayment of which is prescribed by law. Neither individually nor collectively are they even susceptible of the construction that the design of the legislature was

to deny to the courts *the exercise of their most just and most necessary inherent power.*" 168 Pac. at. p. 138 (emphasis supplied.)

The foregoing decision was reaffirmed, with a further historical review, in *Majors* v. *Superior Court*, 181 Cal. 270, 184 Pac. 18 (1919). A variety of other cases adopt a similar view in both state [1] and federal [2] courts.

For our purpose, cases of particular interest are those dealing with the inherent power of a court to provide justice to a pauper in a criminal case without cost to him. Among the more pertinent is *Knox County Council* v. *State*, 217 Ind. 493, 29 N. E. (2d) 405 (1940). Certain earlier Indiana decisions had stated that at common law a court could not grant *in forma pauperis* relief to plaintiffs in civil cases. *Hoey* v. *McCarthy*, 124 Ind. 464, 466, 24 N. E. 1038 (1890): *Harrison* v. *Stanton*, 146 Ind. 366, 371, 45 N. E. 582, 583 (1896). Nonetheless in a criminal case, the Indiana court held that an attorney could be assigned to defend a pauper, regardless of statute. But then, faced

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[1] *Hickey* v. *Rhine*, 16 Tex. 576 (1856), plaintiff allowed to proceed in civil case without security for costs; *In re Morgan*, 122 Ind. 428, 432, 23 N. E. 863, 864 (1889), in proper case court can require transcript for criminal defendant at public expense; *State ex rel. Coella* v. *Fennimore*, 2 Wash. 370, 26 Pac. 807 (1891), criminal defendant granted transcript of record at public expense; *Lewis* v. *Smith*, 21 R. I. 324, 43 A. 542 (1899), plaintiff allowed to proceed at law without security for costs upon showing of probable cause of action since plaintiff had already shown unavailing efforts to obtain surety; *Northup* v. *Peacedale Mfg. Co.*, 25 R. I. 503, 56 A. 685 (1903), plaintiff allowed to proceed by his next friend without giving security for costs when next friend also unable to give such security; *Willis* v. *Willis*, 20 Pa. Dist. 720 (1911) non-resident plaintiff allowed to sue in trover without security for costs; *Jeffries* v. *State*, 9 Okla. Cr. 573, 132 Pac. 823 (1913), criminal defendant granted transcript of the record at public expense; *State* v. *Klein*, 95 Conn. 451, 112 A. 524 (1920), defendant in criminal case allowed transcript of evidence and printing of record on appeal at public expense. *cf. State* v. *Morgan*, 152 Ore. 1, 4, 48 Pac. (2d) 766, 767 (1935).

[2] *Bradford* v. *Bradford*, 3 Fed. Cas. 1129 (C. C. W. D. Tenn., 1878), plaintiff allowed to proceed at law *in forma pauperis*; *Ferguson* v. *Dent*,

with a unique rule in Indiana that an attorney cannot be compelled to serve without compensation, the court held that, as a matter of inherent power, it could require that the county pay the attorney for his services. In a very full review, the court pointed out that the judiciary must have the power to do what is necessary to discharge its functions, that in a criminal case this must include the power to see that a pauper is defended, and that the legislative branch cannot interfere with this power even by attempting to deny the funds to meet necessary expenses. The court said:

> "The Constitution of this state vests the judicial power in the courts. The judiciary is an independent and equal coordinate branch of the government. Courts were established for the purpose of administering justice judicially, and it has been said that their powers are coequal with their duties. In other words, they have inherent power to do everything that is necessary to carry out the purpose of their creation. • • •
>
> "It seems to be the universal rule that 'a court has the inherent power and authority to incur and order paid all such expenses as are necessary for the holding

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15 Fed. 771 (C. C. W. D. Tenn., 1883), indigent minor allowed to defend in equity *in forma pauperis* through his guardian. But *cf. Roy* v. *Louisville etc. R. Co.*, 34 Fed. 276 (C. C. W. D. Tenn., 1888), indigent minor denied permission to proceed at law as plaintiff *in forma pauperis* through his next friend—on the theory that if his next friend was without means a substitute could be supplied by the court with sufficient means; and *Bristol* v. *United States*, 129 Fed. 87 (C. C. A. 7, 1904), criminal defendant denied right to appeal *in forma pauperis*. *Forma pauperis* relief was available in admiralty as a matter of inherent power of the court. *The Great Britain*, 10 Fed. Cas. 1050 (S. D. N. Y., 1843), seaman's libel for wages; *The Arctic*, 1 Fed. Cas. 1089 (E. D. Mich., 1871), seaman's libel for wages; *Berhaus* v. *Georgeanna*, 31 Fed. 405 (S. D. N. Y., 1887), seaman's libel, apparently for wages; *Lowndes* v. *The Phoenix*, 36 Fed. 272 (D. S. Car., 1888), seaman's libel for personal injuries. The decision of the Comptroller of the Treasury at 1 Comp. Dec. 29 (1894) reflects a practice in the lower federal courts of affording *forma pauperis* relief to criminal defendants to the extent even of printing a record on appeal despite absence of statutory provision therefor.

of court and the administration of its duties'. 14 American Jurisprudence, § 171, p. 371. • • •

"The conclusion seems unavoidable that it is the duty of courts to see that criminal cases are tried; that these cases cannot be legally tried unless the defendant, if he is a pauper, is provided with counsel; that attorneys cannot be compelled to serve without compensation; and therefore that, in order to conduct a legal trial, the court must have power to appoint counsel, and order that such counsel shall be compensated if necessary; and that the right to provide compensation cannot be made to depend upon the will of the Legislature or of the county council." 29 N. E. (2d) at pp. 407-408, 413.

Compare *Board of Commissioners of Howard County* v. *Pollard*, 153 Ind. 371, 55 N. E. 87 (1899).

The fact of the matter is that State courts have held that, without statutory authority therefor, a court can require that an indigent defendant in a criminal case be furnished with a transcript, for the purpose of his appeal, at public expense. *State* v. *Klein*, 95 Conn. 451, 112 Atl. 524 (1920); *Jeffries* v. *State*, 9 Okla Cr. 573, 132 Pac. 823 (1913); see *In re Morgan*, 122 Ind. 428, 432, 23 N. E. 863, 864 (1890); *cf. State ex rel. Parmenter* v. *District Court of Ravalli County*, 111 Mont. 453, 455, 110 P. (2d) 971, 972 (1941). Indeed, even where a state statute has expressly provided that the appellant must pay for the printing of the record, a court has insisted upon carving out an exception so that, where, in the opinion of the trial court, the circumstances justify, an indigent defendant in a criminal case will be furnished with a transcript and a printed record at public expense. *State* v. *Klein, supra.*

2. The Decisions of this Court Have Recognized the Inherent Power to Aid Paupers in a Criminal Case, Including the Power to Provide a Transcript without Cost.

Decisions of this Court have accorded with the authorities just reviewed. A brief reference to two statutes will aid an analysis of these decisions.

Legislative action for relief of poor persons in criminal proceedings in United States courts began with the Act of August 8, 1846, c. xcviii, § 11, 9 Stat. 74, which became R. S. § 878, and is now carried at 28 U. S. C. A. § 656. This section provides that where a criminal defendant makes affidavit that he is unable to pay the fees necessary to secure the attendance of certain witnesses vital to his defense, the court may order such witnesses subpoenaed and the cost incurred for process and fees shall be paid in the same manner that similar costs and fees are paid in the case of witnesses subpoenaed on behalf of the United States. In the Act of July 20, 1892, c. 209, 27 Stat. 252, Congress first dealt with the indigent in civil cases. This Act, as amended and extended to include criminal cases now appears as 28 U. S. C. A. §§ 832-836. As first adopted, it provided that pauper plaintiffs might commence and prosecute their actions without the prepayment of fees and costs and without giving security therefor. See *infra*, p. 34.

These were the only two federal statutes giving relief to paupers prior to 1910. However, this Court asserted a very considerable inherent power, apart from statute, to assure protection, at Government expense, of a person charged with a crime.

In *United States* v. *Barber*, 140 U. S. 164 (1891), this Court held that a commissioner of a circuit court might recover from the United States for his fees for the administration of oaths for sureties and the jurats thereto, in connection with bail for defendants in criminal

cases. The Court said that while bail or recognizance is primarily for the benefit of the defendant, and the costs therefor in a civil case must be paid by the interested party, a criminal case is another matter. The interest of the public in securing the criminal defendant's liberty on bail is such as to make the charge against the Government a proper one.

At the same time the Court decided *United States* v. *Van Duzee*, 140 U. S. 169 (1891). There it held that although R. S. §1033, which provided for furnishing a defendant with a copy of the indictment without cost to him, was limited to capital cases, a court might, in its discretion, require that a copy be furnished in a non-capital case at the expense of the Government. After pointing out that neither the Sixth Amendment nor any statute required that the accused be informed of the accusation against him "at the expense of the government," this Court said:

> "We have no doubt, however, of the power of the court to order a copy of the indictment to be furnished upon the request of the defendant, and at the expense of the government; and, when such order is made, the clerk is entitled to his fee for the copy." 140 U. S. at 173.

Then, after the adoption of the Act of 1892, applicable, as we have seen, only to civil cases, this Court decided *United States* v. *Gildersleeve*, 193 U. S. 528 (1904). In that case it appeared that a defendant, having been convicted of a criminal conspiracy and desiring to prosecute an appeal, filed a praecipe with the clerk requesting that the transcript of the entire record be prepared to consist of the pleadings, exhibits, record entries, and the testimony in connection with the trial and also the transcription of all the stenographers' minutes. The clerk estimated the cost of such a record at approximately $400.00. Thereupon the defendant filed a plea with the district judge stating

the cost of such a record as estimated by the clerk and pointing out that he was without funds to meet this cost. The plea requested the district judge to direct the clerk to prepare the record at Government expense. The district judge, without reference to any statute, granted the plea and issued an order to the clerk to prepare the transcript as requested in the praecipe.[1] The transcript was duly prepared and the case certified for appeal.

Thereafter the clerk made his claim against the United States for the cost of preparing this transcript. The clerk's account in this amount was disallowed by the accounting officers of the Treasury Department and in due time the clerk brought an action in the Court of Claims to recover the cost of preparing this transcript. The Court of Claims rendered judgment in favor of the clerk and the United States brought the case to this Court.

The Government's position was that R. S. § 878, *supra*, p. 27, was the exclusive definition of the Government's liability to aid an indigent criminal defendant and that other costs connected with his defense could not be paid by the United States. But this Court held:

> "Section 878 was originally enacted in 1846, and should not be held to operate as a prohibition to the extent contended. *The indigent defendant ought not to be deprived of availing himself of his writ of error because of his poverty*, and, when the court has ordered the transcript in the interest of justice, the clerk ought not to be deprived of compensation." 193 U. S. at 530 (emphasis supplied).

Thus by 1904, this Court had allowed, at Government expense, and without statutory provision therefor, a number

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[1] Certified copies of the praecipe, plea, and order appear in the record of the *Gildersleeve* case in the Court of Claims. This record is now lodged in the National Archives. Reference to this record is helpful to a full statement of the case.

of aids to criminal defendants,[1] including the very thing which the petitioner in the present case seeks. The question then is whether any barrier to such assistance has been erected since that time.

The opinion in the *Gildersleeve* case was rendered for a unanimous court by Chief Justice Fuller. Eight months later, in an opinion by the same Justice, also for a unanimous court, this Court decided that the Act of 1892, *supra*, p. 27, did not apply to a proceeding in an appellate court on writ of error in a civil case, but applied only to proceedings in a court of original jurisdiction, and also that an appellate court has no power in the absence of statutory provision therefor to waive the payment of costs on appeal, which are "the creatures of statute". *Bradford* v. *Southern Railway Co.*, 195 U. S. 243 (1904).[2]

The opinion in the *Bradford* case does not mention the *Gildersleeve* case, or the *Barber* or *Van Duzee* cases. *Supra*, pp. 27, 28. It is hardly conceivable that it was intended to overrule these cases, particularly in view of the fact that the *Gildersleeve* decision had been rendered so recently. Hence it must be concluded that, although this Court was denying any inherent power to waive costs in an appellate court in a civil case, the prior decisions respecting the power to aid a criminal defendant were meant to be left undisturbed.[3]

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[1] In addition to the cases in this Court, as we have seen *supra*, p. 25, n. in 1894 the Comptrolleer of the Treasury ruled that, despite the absence of statutory provision therefor, the expense of printing the record upon appeal by an indigent defendant in a criminal case could properly be charged against the appropriation for "Miscellaneous Expenses, United States Courts". 1 Comp. Dec. 29.

[2] See also *Gallaway* v. *Fort Worth Bank*, 186 U. S. 177 (1902); *Kinney* v. *Plymouth Rock Squab Co.*, 236 U. S. 43, 45 (1915); *cf. Ex parte Abdu*, 247 U. S. 27, 30 (1918).

[3] While the Court's opinion quotes from *Bristol* v. *United States*, 129 Fed. 87 (C. C. A. 7, 1904), a criminal case, the passage quoted relates only to the conclusion that the Act of 1892 does not apply to appellate proceedings.

Whether or not it is valid to apply a rule of strict construction of a court's powers, statutory or inherent, to give *in forma pauperis* relief in civil cases, very different considerations of policy should be controlling with respect to criminal cases, especially where a defendant's life or liberty is at stake. See *Boykin* v. *Huff*, 121 F. (2d) 865, 872 (App. D. C., 1941).

In the *Bradford* case, the Court quoted the following passage from an opinion in *Moore* v. *Cooley*, 2 Hill 412 (N. Y. Special Terms, 1845):

> "'There can be little doubt that the (*forma pauperis*) statute under which this motion is made, should be construed strictly; for the pauper comes to litigate entirely at the expense of others. He is neither to pay his own attorneys or counsel, nor is he liable to his adversary should the suit prove to be groundless. He thus enjoys a great privilege and exemption from the common lot of men, whereby, in respect to causes of action proper, he becomes, as Lord Bacon says, rather able to vex than unable to sue. (Hist. of Hen. 7).'"
> 195 U. S. at 249.

In other words, in a civil case, a plaintiff pauper, if freed of expense, can vex a defendant under conditions in which it is not easy to prevent abuse. But in a criminal case there is no such risk. On the contrary, the party adverse to the pauper, the public, should be just as interested as the pauper himself in assuring a complete and fair hearing. *Cf. United States* v. *Barber*, 140 U. S. 164, 166-167 (1891); see also *supra* p. 17.

Therefore in construing a court's powers to extend aid to a pauper in a criminal case, a liberal rather than strict attitude should prevail; the matter is not dissimilar to the construction of statutes affording aids to seamen in litigating their rights, where the courts have taken a liberal attitude. 28 U. S. C. A. §837; see *Bainbridge* v. *Merchants & Miners Trans. Co.*, 287 U. S. 278, 282 (1932); *Grant* v.

United States Shipping Bd. Emergency F. Corp., 24 F. (2d) 812, 813 (C. C. A. 2, 1928); *The Astra*, 34 F. Supp. 152, 153-154 (D. Md., 1940); *cf. Warner* v. *Goltra*, 293 U. S. 155, 158-159 (1934). But *cf. Ex parte Abdu*, 247 U. S. 27, 29-30 (1918).

Another reason for believing that the *Bradford* case was not intended to overrule the *Gildersleeve* and other cases is that the former dealt solely with the costs in an appellate court rather than with the powers of a trial court. Indeed the opinion emphasized that an appeal was entirely a matter of statute and not of common law. 195 U. S. at 250; *cf. Ex parte Abdu*, 247 U. S. 27, 30 (1918).

A trial court has very extensive inherent powers, even in a civil case, to appoint persons to aid in the discharge of justice and to incur costs therefor which may be assessed against the parties. In *Ex parte Peterson*, 253 U. S. 300 (1920), it was held that, despite absence of statutory authority, a federal district court could retain an auditor, with a stenographer, to conduct an investigation in a civil law suit in order to straighten out and simplify issues, and could assess the costs thereof against the losing party. Similarly, Rule 80 of the *Rules of Civil Procedure* provides that the district courts may designate official stenographers to take down the evidence, and that their charges will be taxable as costs in the discretion of the trial judge. In the nature of things a trial court, as distinguished from an appellate court, must have considerable latitude to proceed in whatever manner may best aid in assuring that justice is done, that a clear record is made up, and that, especially in criminal cases, an indigent is protected.[1] And if, to meet the ends of justice, costs may be incurred at the court's

[1] The propriety of a trial court's dealing with matters of this kind in whatever manner best suits the case is illustrated by rulings that ordinarily, even in a case admittedly falling within the scope of the Act of 1892 (it was amended in 1910 to include appellate proceedings) a pauper should make an application to appeal *in forma pauperis* to the trial court rather than to the appellate court. *Smith* v. *Johnston*, 109 F. (2d) 152, 155 (C. C. A. 9, 1940).

direction, despite absence of statutory authority, assessable against private parties in a civil case, there is even stronger reason that the trial court should have a broad discretion to see to it that necessary aids are provided in a criminal case and, where the defendant is a poor person, to incur expense which will be met by the Government. Indeed, such aid in procuring a transcript to make up the record must be contemplated by the provision of Rule 7 of the *Rules of Criminal Procedure after Verdict* that, when a notice of appeal is filed, the trial judge shall give

> "directions for the purpose of making promptly available all necessary transcripts of testimony and proceedings."

The fact that the trial court's power which is in question relates to taking action for the purpose of appellate review and that the right to such review is statutory, should not affect the situation. In the first place, the power of a trial court to have a clear record made up should be assessed with a view to other needs, as well as those of appeals.[1] In the second place the denial of power in the *Bradford* case related only to the costs in the appellate court itself, the functions and operations of which, unlike those of a trial court, are dependent solely upon the conditions laid down by the legislature.[2] And in the third place if, as the authorities already reviewed demonstrate, a trial court does have broad powers apart from statute to do its work, the fact that a particular task is placed upon it by statute—that of preparing a case for appellate scrutiny—should not mean that it cannot bring to the discharge of that task all its powers.[3]

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[1] The report of a committee of the Judicial Conference, appointed to study the system of court reporting in the federal courts, points out:

> "Even in cases where there is no appeal, a record should be made of proceedings had in open court because of the importance they may have in matters arising in the future. This is true even in criminal trials and submissions, where the proceedings had may be important

It must, therefore, be concluded that there is nothing in the *Bradford* case which impairs the force of this Court's earlier decisions, in the *Gildersleeve* and other cases, respecting the inherent power of a trial court to incur expense in order to protect a defendant charged with crime. Nor are there any later cases which qualify those decisions. In fact, of later cases, *Ex parte Peterson* is most nearly applicable and both the holding and the opinion in that case support the view of a trial court's inherent power which is represented by the *Gildersleeve* case.

We may turn now to the actions of Congress.

B. *No Act of Congress Has Limited the Inherent Power of a Trial Court to Assist a Pauper Defendant in a Criminal Case by Providing Him With a Transcript of Testimony in Order to Make up a Record.*

The Act of 1892, to which we have already referred, *supra*, p. 27, providing for *in forma pauperis* relief to plaintiffs in civil cases, originally read as follows:

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any citizen of the United States, en-

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in proceedings looking to the parole of the prisoner or his release under writ of habeas corpus."

See pages 2-3 of the letter of Judge John J. Parker to the Director, Administrative Office of the United States Courts, transmitting a draft of a bill to provide for court reporters, dated October 24, 1941. It should be observed, also, that a trial court may well need a stenographic transcript, in certain circumstances, to aid it in making rulings at the trial, in instructing the jury, in passing on motions for a new trial, and in other respects not related to preparation for an appeal.

[2] But cf. *supra*, pp pp. 21, 26.

[3] For example, a court's inherent power, in the absence of statute, to permit a plaintiff to sue *in forma pauperis* should not be denied where the plaintiff's cause of action happens to be statutory in origin. The considerations mentioned in the text were overlooked by the lower court in *Rucker* v. *Superior Court*, 104 Cal. App. 683, 286 Pac. 732 (1930). This was a civil case in which, despite *Martin* v. *Superior Court*, *supra*, pp. 22, 23, it was held that, in the absence of statutory provision therefore, a court would not furnish a transcript to a pauper for the purpose of a record on appeal.

titled to commence any suit or action in any court of the United States, may commence and prosecute to conclusion any such suit or action without being required to prepay fees or costs, or give security therefor before or after bringing suit or action, upon filing in said court a statement under oath, in writing, that, because of his poverty, he is unable to pay the costs of said suit or action which he is about to commence, or to give security for the same, and that he believes he is entitled to the redress he seeks by such suit or action, and setting forth briefly the nature of his alleged cause of action.

"Sec. 2. That after any such suit or action shall have been brought, or that is now pending, the plaintiff may answer and avoid a demand for fees or security for costs by filing a like affidavit and wilful false swearing in any affidavit provided for in this or the previous section, shall be punishable as perjury is in other cases.

"Sec. 3. That the officers of court shall issue, serve all process, and perform all duties in such cases, and witnesses shall attend as in other cases, and the plaintiff shall have the same remedies as are provided by law in other cases.

"Sec. 4. That the court may request any attorney of the court to represent such poor person, if it deems the cause worthy of a trial, and may dismiss any such cause so brought under this act if it be made to appear that the allegation of poverty is untrue, or if said court be satisfied that the alleged cause of action is frivolous or malicious.

"Sec. 5. That judgment may be rendered for costs at the conclusion of the suit as in other cases: Provided, That the United States shall not be liable for any of the costs thus incurred."

The purpose of the Act was set forth in the report of the House Committee on the Judiciary (HOUSE REPORT No. 1079, 52ND CONG., 1ST SESS.) and in debate upon the original bill in the House of Representatives (23 CONG. REC. 5199). The House Report stated:

"This Bill proposes to open United States Courts to a class of American citizens who have rights to be adjudicated, but who now are excluded practically for want of sufficient money or property to enter the courts under their rules * * * In short, this bill presents the question whether this Government, having established courts to do justice to litigants will admit the wealthy and deny the poor entrance to them to have their rights adjudicated * * * The question is narrowed therefore to this: Will the Government allow its courts to be practically closed to its own citizens, who are conceded to have valid and just rights, because they happen to be without the money to advance to pay to the tribunals of justice. Many humane and enlightened states have such a law, and the United States Government ought to keep pace with this enlightened judgment."

After the decision in the *Bradford* case, section 1 of the Act of 1892 was amended in 1910 to approximately its present form, not including the last sentence of the present section, which was added later.[1] The amending statute is the Act of June 25, 1910, c. 435, 36 Stat. 866.

The original bill in the Senate merely enlarged the 1892 Act to include appellate proceedings so as to correct the defect found in the *Bradford* case. In the debates on this bill, Senator Bacon said:

"The sole purpose of this bill is to enlarge the law as it now stands upon the statute books as it has been construed by the Supreme Court, so that one who is unable to pay the costs of a suit shall not only be permitted to pursue it in the court where it originates, but also in the appellate courts." 45 CONG. REC. 1532.

After the bill had passed the Senate the House Committee (HOUSE REPORT No. 1591, 61ST CONG., 2ND. SESS.), amended

[1] None of the other four sections of the Act of 1892 has ever been amended. The exact changes in the wording of section 1 effected by the 1910 amendment are shown in the opinion in *Kinney* v. *Plymouth Rock Squab Co.*, 236 U. S. 43, 44 (1915). The present wording of the Act, showing how it has been changed by amendments, appears in Appendix C hereto.

it to include criminal cases and defendants, and so the act was adopted. The House Committee did not state any specific reason for adding the language on criminal cases and defendants, and no mention is made of these particular additions in the debates.

In 1916 the District Court for the Northern District of California decided *United States* v. *Fair*, 235 Fed. 1015. This is the first of a series of cases in the lower federal courts in which it has been said or held that an indigent defendant in a criminal case is not entitled, under the Act of 1892 as amended, to be furnished, without cost to him, with a transcript in order to make up a record. None of these cases refers to the decision of this Court in the *Gildersleeve* case, *supra*, p. 28), and practically all of them rely upon the *Fair* case.

In the *Fair* case, after his conviction of using the mails to defraud, the defendant moved the trial court for an order directing the reporter to transcribe the testimony at the Government's expense in order that he might present a bill of exceptions. The court held that section 5 of the Act of 1892 made this impossible because of the proviso in that section stating that the United States is not liable for costs incurred by a judgment for costs. The court also stated that the reporter was not an officer of the court, but reported the case simply under contract with the Department of Justice, and that therefore the court could not order him to transcribe his notes without compensation.[1]

The reasoning in the case, at least with respect to the impossibility of charging the Government with the cost of the transcript, is wholly fallacious and deprives the entire series of the later cases relying on the *Fair* case of persuasive authority.

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[1] It has since been held that the same result must be reached even if the stenographer is an official court reporter. *Estabrook* v. *King*, 119 F. (2d) 607 (C. C. A. 8, 1941).

Section 5, it will be recalled, provides:

> "That judgment may be rendered for costs at the conclusion of the suit as in other cases: Provided, That the United States shall not be liable for any of the costs thus incurred."

It will also be recalled that this section appeared in the Act of 1892 and was not affected by the 1910 amendment. It will be recalled further that the Act of 1892 applied only to a pauper plaintiff in a civil case.

Section 5 was adopted to meet the following situation. A pauper plaintiff might later come into funds. Therefore there could be no reason for denying to a defendant, in circumstances where he would otherwise be entitled to judgment for costs from a plaintiff, the right to such judgment merely because the plaintiff was a pauper at the time suit was brought. The same thing would be true of an officer of the court who had the right to collect fees from parties for his personal account. Therefore section 5 as first reported to the House by the Committee on the Judiciary provided:

> "That judgment may be rendered for costs at the conclusion of the suit as in other cases." 23 CONG. REC. 5199.

From this section as originally proposed, however, there might have arisen an implication that if the pauper could not pay the judgment for costs the Government would have to pay it to the party in whose favor judgment was entered. This plainly was not intended. Nevertheless, someone wanted it to be absolutely clear, so Mr. Culberson, in charge of the bill, stated at the conclusion of the debate in the House:

> "Mr. Speaker, I am under obligations to a gentleman who is not present in the House to offer an amendment, which will not alter the main provisions, *and which I think is unnecessary*, but which I now offer. At the end of Section 5 to insert the words: *Provided*,

> That the United States shall not be liable for any of the costs thus incurred." 23 CONG. REC. 5199. (emphasis supplied).

This was the only discussion of the matter and the amendment was adopted.

Thus the proviso in section 5 did nothing more than to negative any implication that the United States would pay a judgment for costs entered against a pauper plaintiff in a civil suit.[1] It does *not* state, as the court in the *Fair* case said, "that Congress did not intend that the United States should be liable for any of the costs incurred under the provisions of the act". 235 Fed. at 1016. And when the 1910 amendment extended section 1 of the Act to cover an indigent defendant in a criminal case, it did not translate section 5 into a prohibition against payment by the United States of any expense in connection with aiding the indigent; at most it meant that when, for instance, clerks collected fees for their personal account, the United States would not pay, for the pauper, a judgment for costs entered against him in the clerk's favor.[2]

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[1] There is an alternative meaning which may be attributed to the proviso in section 5, which is consistent with the brief discussion of the proviso in the House debates. That alternative is that Congress merely meant to negative any possible implication that section 5 modified the long standing rule against assessing costs against the United States as a litigant in a case where the United States is a party. It would, of course, not follow that the United States should never bear any of the expense of making justice available to paupers accused of crime in its courts. This argument is developed at length in a very exhaustive brief filed in this Court on behalf of the petitioner in *Evans* v. *United States*, 312 U. S. 651 (1941), see *infra*, p. 55. This brief is still available in this Court's files and has proved of great assistance to present counsel.

[2] The statement in the text assumes that when section 1 of the Act of 1892 was amended in 1910 to cover criminal cases, section 5 was intended likewise to apply to criminal cases. However, this may never have been intended at all. The section simply reflects a page of history. The Statutes of 11 Henry VII, *supra*, p. 20, and of 23 Henry VIII, *supra*, p. 20, n. 1, relieved a pauper plaintiff in civil suits from the necessity of paying fees or costs, but it has been thought that some judges insisted that if the pauper were non-suited he had either to pay the costs or be whipped. Maguire, *Poverty and Civil Litigation*, 36 HARV. L. REV. 361, 374-375

The conclusion that section 5 deals solely with the mechanical matter of entering judgment for costs is supported by this Court's description of the section in its opinion in *Kinney* v. *Plymouth Rock Squab Co.*, 236 U. S. 43 (1915). The Court said:

> "The fifth and last section points out the manner of entering judgment concerning costs in cases under the statute." 236 U. S. at 45.

This statement was made in the course of a discussion in which this Court reviewed all the provisions of the statute, as amended in 1910. Surely if the proviso in section 5 had the character of a sweeping prohibition against the United States' bearing any expense of aiding a pauper, as held in the *Fair* case, this Court would have paraphrased it in very different terms.

It would serve no useful purpose to discuss the later cases on the question whether the United States can pay for a transcript. As we have indicated, they rely on the *Fair* case and are subject to its infirmities. See *United States ex rel. Estabrook* v. *Otis*, 18 F. (2d) 689 (C.C.A. 8, 1927); *United States ex rel. McNeill* v. *Avis*, 108 F. (2d) 457 (C.C.A. 3, 1939); *Estabrook* v. *King*, 119 F. (2d) 607

(1923). Like some other curious practices attributed to the days of yore, this one may be apocryphal. Note, *Proceedings in Forma Pauperis*, 31 HARV. L. REV. 485 (1918). And one court pointed out that in any event it could not follow the practice because it had no whipping machinery. *Ibid.* However, there is no question but that an earlier liberality toward pauper plaintiffs produced a reaction, as the result of paupers' having abused their privilege to the vexation of defendants, and the English courts became very severe in their treatment of pauper plaintiffs who brought suits which failed. Maguire, *op. cit. supra* p. 21, at pp. 374 *et seq.* So section 5 of the Act of 1892 was originally designed to curb paupers too eager to litigate. Indeed, the House Committee explained the section as follows:

> "And to avoid possibility of imposition judgment may be rendered for costs as in other cases, so that if the party succeed in the suit, or failing should afterwards acquire property, the costs may be made out of him." HOUSE REPORT No. 1079, 52ND CONG., 1ST SESS.

Therefore, it is quite to the point to suggest that section 5 has no application whatsoever to a criminal case, since the need "to avoid possibility of imposition" is wholly lacking in such a case.

(C.C.A. 8, 1941); *United States* v. *Strewl*, 28 F. Supp. 87 (N. D. N. Y., 1937); 9 Comp. Gen. 503 (1930); *cf. Middleton* v. *Hartford Acc. & Indemnity Co.*, 119 F. (2d) 721, 724 (C.C.A. 5, 1941); *Cheek* v. *Thompson*, 33 F. Supp. 497, 499 (W. D. La., 1940).

It should be observed, however, that the lower courts have not uniformly followed the *Fair* case. See order [1] entered in *United States* v. *Ramsey*, N. D. Okla., quoted in 9 Comp. Gen. 503 (1930); see reference to action in *United States* v. *Thompson*, W. D. Ky., in *Thompson* v. *King*, 107 F. (2d) 307, 308 (C.C.A. 8, 1939).

As we shall show later, the Act of 1892, as amended, must be taken to contemplate that the pauper defendant will have the benefit of a transcript of the testimony, without cost to him, in order to make up the record. However, even if the Act made no such provision, there remains the inherent power of a trial court to see to it that the pauper gets his record, at the expense of the United States if necessary. *Supra*, pp. 20-34. This power was recognized before 1910, the *Fair* case was incorrect in interpreting section 5 of the Act of 1892, as prohibiting such action, and there is nothing else in the Act prohibiting it.

That Congress has by statute made partial provision for a pauper does not mean that a court's inherent power to extend further assistance is wholly superseded by the statute. We have seen that this Court, in *United States* v. *Van Duzee*, *supra*, p. 28, held that a statute, providing that a defendant in a capital case should be furnished a copy of the indictment without cost, did not mean that, in a non-capital case the court could not, where appropriate, require that the same thing be done at the Government's expense. We have also seen that, in *United States* v. *Gildersleeve*, *supra*, p. 28), the Government argued that R. S. §878, providing for the Government's meeting the expense of witnesses for an indigent criminal defendant,

[1] This order will be found *infra*, p. 51, n. 1.

must be taken as the exclusive definition of such a defendant's privileges; but this Court held that the Government could be required to pay for transcribing the stenographer's notes and other expenses in connection with the preparation of a record.

So, when Congress extended the Act of 1892 to criminal cases—even if it be assumed that that Act does not make complete provision for the pauper—it does not follow that Congress meant to restrict the judiciary's pre-existing powers to aid the indigent. They remain—at least until barred by a prohibition more explicit than can be found in a statute in which Congress was trying to lend a helping hand. *Cf. Martin* v. *Superior Court, supra*, p. 23.

C. *The Act of 1892, as Amended, Empowers a Trial Court to Assist a Pauper Defendant in a Criminal Case by Providing Him with a Transcript of Testimony in Order to Make Up a Record.*

In any event, the Act of 1892 itself, as amended, does authorize a trial court to furnish a transcription of the stenographer's notes for the purpose of perfecting the record without cost to a pauper defendant.

If this was not the case after the 1910 amendment, it was certainly true after a further amendment occurring in 1922.

Section 1 of the Act, as amended in 1910, provides that a pauper may defend and appeal a case, civil or criminal, and shall not be "required to prepay fees or costs or for the printing of the record in the appellate court." In 1922 there was a further amendment consisting of the addition at the end of section 1 of the following:

> "Provided, That in any criminal case the court may, upon the filing in said court of the affidavit hereinbefore mentioned, direct that the expense of printing

the record on appeal or writ of error be paid by the United States, and the same shall be paid when authorized by the Attorney General." Act of June 27, 1922, c. 246, 42 Stat. 666.

The 1922 amendment was prompted by a ruling of the Comptroller of the Treasury in 26 Comp. Dec. 362 (1919), rendered subsequent to the decision of *United States* v. *Fair*, *supra*, p. 37.

The Attorney General had asked the Comptroller whether he could authorize the printing of a record, at the Government's expense, upon a pauper's appeal in a criminal action. The Comptroller concluded that while, prior to the 1910 amendment to the Act of 1892, this could have been, and was, done, the 1910 amendment made that impossible. He applied the same reasoning as that in the *Fair* case: that is, he translated the proviso in section 5 of the 1892 Act into a prohibition against the Government's bearing any expense in connection with the aid afforded to a pauper. Thus, as did the court in the *Fair* case, he concluded that Congress, in trying to be helpful to indigent criminal defendants in 1910, had actually curtailed the courts' power to aid them as that power had theretofore existed.

Then the Comptroller went on to point out that in the Act of February 13, 1911, c. 47, 36 Stat. 901, 28 U. S. C. A. §§ 865, 866, adopted within less than a year after the 1910 amendment to the Act of 1892, Congress provided that the record on appeal must be printed in all cases. This, ruled the Comptroller, meant that Congress had defeated its own purpose. The 1910 amendment permits the pauper to appeal; the 1911 Act requires that a record on appeal be printed in all cases; section 5 of the 1892 Act, he said, prohibits the Government from bearing any expense in connection with the aid afforded a pauper; therefore the pauper cannot enjoy

his appeal! And, not daunted by his logic, he drove home his point with this extraordinary statement:

> "While running through all of the statutes quoted is evidence of a benevolent intention on the part of Congress that a poor defendant shall have the free and unrestricted right from a financial standpoint to make his full defense to final conclusion, yet the effect of the statutes seems to be to render this intention nugatory, since the final requirement of the legislation, a printed record, is expressly prohibited from being furnished at the cost of the United States." 26 Comp. Dec. at 364.

Such uninspired preoccupation with words in a book, defying the admitted intention of Congress, would, if generally followed, make Congress impotent to effect its will.

It may be noted in passing that exactly the same kind of dry logic has been rejected by one court in connection with a very similar argument. In 28 U. S. C. A. §549 there is a general provision that a fee of five dollars must be paid to the clerk before filing a suit. A pauper, desiring to file a suit, applied for leave to proceed *in forma pauperis* under the Act of 1892. It was suggested that an application to proceed *in forma pauperis* is itself the institution of a proceeding and that therefore the pauper would have to pay five dollars before filing such an application with the district court. Judge Denman made short shrift of that argument, saying:

> "It is irrational to suppose Congress intended the mockery of appearing to give the pauper the remedy of § 832 (*i. e.* the Act of 1892) and then requiring him, without funds, to pay $5.00 to procure the relief." *Ex parte Hall*, 31 F. Supp. 86, 87 (N. D., Calif., 1940).

The ruling of the Comptroller of the Treasury imputing the mockery of allowing an appeal *in forma pauperis*, but at the same time denying the means for appeal, was equally irrational.

Faced with this Comptroller's ruling, the Attorney General addressed to Congress a letter [1] concluding:

> "May I suggest that, in order that poor defendants' rights in criminal cases may be fully conserved, the act of June 25, 1910, be amended by the addition of a proviso in substantially the following form:
>
> "'*Provided*, That in any criminal case the court may, upon the filing in said court of the affidavit hereinbefore mentioned, direct that the expense of printing the record on appeal or writ of error be paid by the United States, and the same shall be paid when authorized by the Attorney General.'"

The Congress, after favorable Committee Reports,[2] adopted the Attorney General's recommendation, in order —to use his words—"*that poor defendants' rights in criminal cases may be fully conserved*". And thus the statute stands today.

It is submitted that the Comptroller of the Treasury, in ruling in 1919 that Congress had failed to carry out its evident intention, was wrong. The law is what Congress intends it to be. The words it uses are but a vehicle, and, however inept or ungrammatical the language, it is the intention which is controlling. Therefore, when Congress has provided that poor defendants in criminal cases may defend and appeal their cases and has evidenced an intention that this be accomplished without cost to them, its will should not be defeated by the technique of interpretation which has made the drafting of appropriation acts the riskiest business in government.

Nevertheless, as we have seen, the influence of *United States* v. *Fair*, 235 Fed. 1015 (N. D. Calif., 1916), has persisted with certain of the lower courts and with the Comp-

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[1] The letter is set forth in SENATE REPORT No. 20, 67TH CONG., 1ST SESS., and in HOUSE REPORT No. 626, 67TH CONG., 2D SESS.

[2] Cited in the preceding note.

troller General. *Supra* pp. 40, 41. The amendment of 1922 has been subjected to the same technique which vitiated the amendment of 1910. However impossible it may be to print a record from shorthand notes, without having them transcribed so that the printer can read what he is to print, it is the Comptroller General's ruling that even though Congress has most explicitly provided for printing the record at the Government's expense in order that the pauper's appeal may be heard, the pauper must still pay for the transcript. This ruling was rendered in defiance of an order of a federal district court, see *infra*, p. 51, n. 1, requiring a transcription at the Government's expense. 9 Comp. Gen. 503 (1930). The "benevolent intention" which Congress admittedly had has not inspired the interpretation of the law.

The result is that not only is the will of Congress defeated but paupers are treated capriciously. The Comptroller General said in 9 Comp. Gen. 503 (1930) that if the court reporter were employed by the Government at an annual salary instead of on a piecework basis the question of requiring him to furnish a transcription to go into the pauper's record "would be an administrative matter." In a recent case this very situation arose. A pauper had been denied the privilege of securing a transcription of the stenographer's notes of testimony for the record on appeal. After this Court granted certiorari, the Government agreed to a remand when it appeared that the stenographer was paid an annual salary of $500 to serve as court reporter and that the Government could secure a transcript and furnish it to the pauper without additional expense. *Evans* v. *United States*, 312 U. S. 651 (1941).

To make such relief to a pauper dependent upon a circumstance as fortuitous as whether the reporter is employed on a piecework or salary basis raises a serious question of arbitrary discrimination violating the guarantees of the Fifth Amendment.

As a matter of fact, the Court of Appeals for the District of Columbia recently suggested—although finding it unnecessary to decide the point in that case—that it might violate this Constitutional guarantee to give the privilege of appeal to those able to pay but to deny it to paupers in serious criminal cases involving their lives and liberty. That court said in *Boykin* v. *Huff*, 121 F. (2d) 865, 872 (1941):

> "While due process under the Fifth Amendment,[1] as under the Fourteenth,[2] does not require appellate review, nevertheless when Congress creates that right it is not free from all constitutional restrictions, including the obligation not to make unreasonable discriminations.[3]
>
> "The assumption has been widespread that Congress has absolute power to grant or withhold appeals

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[1] *Cf. Cobbledick* v. *United States*, 1940, 309 U. S. 323, 325, 60 S. Ct. 540, 84 L. Ed. 783, referring for the history of federal criminal appeal to *United States* v. *Sanges*, 1892, 144 U. S. 310, 319-322, 12 S. Ct. 609, 36 L. Ed. 445; *Applebaum* v. *United States*, 7 Cir., 1921, 274 F. 43; *Haywood* v. *United States*, 7 Cir., 1920, 268 F. 795, 798, certiorari denied, 1921, 256 U. S. 689, 41 S. Ct. 449, 65 L. Ed. 1172.

[2] *Frank* v. *Mangum*, 1915, 237 U. S. 309, 35 S. Ct. 582, 59 L. Ed. 969; *McKane* v. *Durston*, 1894, 153 U. S. 684, 687, 14 S. Ct. 913, 38 L. Ed. 867; *Smith* v. *Bastin*, 1921, 192 Ky. 164, 232 S. W. 415.

[3] In *Frank* v. *Mangum*, 1915, 237 U. S. 309, 327, 35 S. Ct. 582, 587, 59 L. Ed. 969, the Court recognized that due process does not require the state to provide for an appeal, but added: "* * * it is perfectly obvious that where such an appeal is provided for, and the prisoner has had the benefit of it, the proceedings in the appellate tribunal are to be regarded as a part of the process of the law under which he is held in custody by the state, and to be considered in determining 'any question' of due process. *Cf. United States ex rel. Henson* v. *Mills*, D. C. E. D. Pa. 1937, 21 F. Supp. 616.

That a state statute which, in the particular circumstances, did not afford an adequate opportunity for taking an appeal generally available, resulted by virtue of its application to those conditions in an unconstitutional discrimination, see *State* v. *Guerringer*, 1915, 265 Mo. 408, 178 S. W. 65.

in forma pauperis.[1] No doubt there is wide latitude for determining how far the Government may be required to bear the costs of civil litigation. It may be assumed also that there is room for some discretion concerning the costs of defense in criminal matters. But when the life or the liberty of the citizen is at stake on a serious criminal charge, and appeals are given as a matter of right to those who are able to pay for them, it may be doubted (though as to this we express no opinion) whether they can be withheld from indigent persons solely on the ground of their poverty or otherwise than so as to give them substantially equal protection with more fortunate citizens. The right of appeal, though statutory, is not insubstantial,[2] and its statutory origin does not make it a matter of such small consequence that it may be given or withheld arbitrarily.

[1] Cf. *De Maurez* v. *Swope*, 9 Cir., 1939, 104 F. (2d) 758, and authorities cited.

[2] As shown by the volume of reversals in criminal cases. During the fiscal year ending June 30, 1940, reversals took place in twenty-four per cent of all criminal cases in which appeals were taken to the United States Circuit Courts of Appeals and this court. Annual Report of the Director of the Administrative Office of the United States Courts (1940) 59.

It cannot be that Congress meant to raise Constitutional doubts, or to involve the United States in such arbitrary discrimination as is shown by the difference between the treatment of the pauper in the *Evans* case, *supra* p. 46, and the treatment thus far of this petitioner.[3]

[3] Despite the statutory origin of the right to appeal, arbitrary discrimination in permitting appeals will violate both the equal protection, *Cochran* v. *Kansas*, 316 U. S. 255 (1942), and the due process guarantees. *Janes* v. *Commonwealth*, 269 Ky. 779, 785, 108 S. W. (2d) 816, 819 (1937); *Life & Casualty Ins. Co.* v. *Womack*, 228 Ala. 70, 71, 151 So. 880, 881 (1933); *State* v. *Guerringer*, 265 Mo. 408, 416-417, 178 S. W. 65, 67 (1915). Hence if circumstances are such as to make it practically impossible to make up a bill of exceptions without a transcript of testimony, it may well be that Constitutional rights are denied to a pauper unless the Government provides the transcript. In any case it is discrimination of the most arbitrary character for the Government to furnish a transcript to some paupers but not to others, depending solely upon the nature of its arrangements with court reporters.

It is suggested that what Congress really meant in its 1910 amendment to the Act of 1892 is this:

The inherent powers of a trial court to aid an indigent in a criminal case, at the Government's expense if need be, were not to be curtailed in any way, but, having those powers in mind, Congress set up a procedure to be followed in affording that relief, with a statutory standard to guide the exercise of a court's discretion. The amended section 1 of the Act states that one may defend his case to conclusion and appeal it, unless the trial court certifies that the appeal is not in good faith, when he shows his inability, because of poverty, to pay the costs of doing so. This broad provision must mean that the pauper will be enabled to do whatever is appropriate in the particular case to accomplish his appeal. If so, and if expense to the court will be involved to accomplish the end, the statute authorizes the expense and the appropriation for miscellaneous expenses of the United States courts is available to meet it.

In addition the Act specifically provides that the pauper defendant will not be required to "prepay fees or costs or for the printing of the record".

Thus the 1910 Amendment to the Act of 1892 left the situation with respect to expense involved in *in forma pauperis* relief as follows. Costs and fees to the regular officers of the court are not paid initially by the pauper. One who is an officer of the court must go ahead and perform his duties, subject to his (or the Government's) right to a judgment for costs against the pauper in an appropriate case.[1] But if the court finds it appropriate to exercise

[1] In view of the fact that payment of fees for the personal account of the regular officers of the court has been largely abolished, except in the case of the official court reporter, the situation today is quite different from what it formerly was. However, the history of the Act of 1892 confirms the statement made in the text. The Act of 1892 as originally introduced provided that "* * * the court may assign to such person counsel, who, as well as all other officers of the court, shall perform their duties in such suit

its power to appoint a stenographer or other aid, the expense of which would ordinarily be assessable as costs, *cf. Ex parte Peterson*, 253 U. S. 300 (1920); Rule 80, *Rules of Civil Procedure*, then the United States will meet that expense subject to the right to have judgment for costs under section 5, just as it would have to meet the expense of printing the record under the express language of section 1.

Whether an official court reporter is an officer of the court, even though he is on a piecework, rather than salary, basis, need not now be decided. If he is, he is probably entitled only to have judgment for his costs against the pauper.[1] If he is not, then the court can have his expense

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without fee or reward". See H. R. 583, 52ND CONG., 1ST SESS., on file in library of United States Senate. However, the House Committee eliminated this provision, pointing out, as noted *supra*, p. 40, n.:

"* * * to avoid possibility of imposition judgment may be rendered for costs as in other cases, so that if the party succeed in the suit, or failing should afterwards acquire property, the costs may be made out of him." HOUSE REPORT No. 1079, 52ND CONG., 1ST SESS.

The debate on the bill in the House discloses the following colloquy with Mr. Culberson, who was in charge of the bill:

"Mr. William A. Stone: In a case where the plaintiff is wholly unable to pay the costs where there is a judgment against him for costs, how do the officers get their pay?

"Mr. Culberson: They do not get anything in that event.

"Mr. William A. Stone: Then you are simply compelling the officers to do that work for nothing.

"Mr. Culberson: We are simply in these cases of charity and humanity compelling these officers, all of whom make good salaries, to do this work for nothing, that is what the bill does. There may be one such case upon their docket of 500 and they are not required to do much ex officio service." 23 CONG. REC. 5199.

[1] See the preceding footnote. This is not unduly harsh. The privilege of serving as court reporter is a practical monopoly which is so valuable that the Government in some cases is actually paid, and in other cases is furnished free service, by the reporter in return for that privilege. And as the debates in the House of Representatives quoted in the preceding footnote show, *in forma pauperis* cases are not numerous; still less numerous would be such cases where the court felt it necessary to have a reporter furnish his services. This would be done only in cases where it is important because of the nature of the case.

paid for from the appropriation for miscellaneous expenses of the United States courts, and presumably the Government can have judgment for such cost.

Thus far in this summary we have been discussing the Act of 1892 as amended in 1910. However, the 1922 amendment, adding to the act the last sentence of the present section 1, would appear to meet the petitioner's contention in this case even if the *Fair* case, interpreting the 1910 amendment, was correctly decided. For the 1922 amendment, designed, as we have seen, *fully to conserve the rights of a criminal defendant, supra*, p. 45, provides in terms that "the expense of printing the record on appeal" shall be paid by the United States. A fair reading of this amendment, motivated as it was, would include the expense necessarily involved in so translating the notes that there can be a legible record for the printer to read, where such notes must be resorted to in order to make up the record.[1]

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[1] As indicated in the preceding footnote, the transcription would not have to be made in every case. The order entered in *United States* v. *Ramsey* by the United States District Court for the Northern District of Oklahoma, which was the occasion for the ruling in 9 Comp. Gen. 503 (1930), see *supra*, p. 46, illustrates the circumstances under which a court might properly invoke a reporter's aid. That order (set out in the Comptroller General's opinion) provided:

> "Order requiring stenographer to make typewritten transcript of testimony in John Ramsey case at Government expense.
>
> "Now on this 27th day of January, 1930, this matter came on to be heard before me, Franklin E. Kennamer, judge of the district court in and for the northern district of Oklahoma, of the United States of America, upon the application of the defendant, John Ramsey, for an order requiring the stenographer taking said testimony on and after the 24th day of November, 1929, to transcribe the same and make certain typewritten copies and furnish the same to counsel of record at the expense of the Government, and the court after being fully advised in the premises and after carefully considering the same finds, that the said defendant has heretofore filed in this court an application in which it is stated that the said defendant is a man without means or friends or relatives who have means with which to pay the said expense, and it being further within the knowledge of

As a matter of fact, were there any doubts remaining, Congress has set them fully at rest by including in the appropriation for miscellaneous expenses of the United States courts a specific item for

> "stenographic reporting services without regard to section 3709, Revised Statutes, provided that the rates of payment shall not exceed those fixed by the district court pursuant to Rule 80(b) Federal Rules of Civil Procedure, in the jurisdiction of which the services are rendered * * *."

This item first appeared in the appropriation for the fiscal year ending June 30, 1942. 55 Stat. 265, 301. It was continued this year. Public No. 664, 77th Cong., 2nd Sess., c. 472, Title IV. At p. 707 of the hearings before the House Committee on Appropriations on the appropriation bill for 1942, Mr. Chandler, Director, Administrative Office of the United States Courts, explained the provision as follows:

> "The reason for this provision is that occasionally, not often, the courts need to have a record made of a proceeding in which the court is concerned. The principal example is a disbarment proceeding * * *."

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the court that the said John Ramsey has heretofore made application for counsel to be appointed for him on account of his poverty and has made written application heretofore for the testimony to be taken at his said trial at Government expense and said verified application has been allowed and said testimony taken, and it being further within the knowledge of the court that the said John Ramsey was convicted of murder and alleges error and desires to appeal from the judgment and sentence, and on account of the large number of witnesses, and the volume of testimony taken consuming some five days, that it will be impractical if not impossible for the same to be agreed upon between counsel and set forth in narrative form and the same being an important case involving a life sentence.

"It is therefore ordered, adjudged, and decreed that the said testimony be transcribed in typewritten form and copies furnished counsel for the defendant and counsel for the Government in addition to the copies for Circuit Court of Appeals."

In view of the historical responsibility of the courts toward pauper defendants in criminal cases, particularly in a case involving a defendant's life and liberty, the interest of a court in such a proceeding is quite as great as its interest in a disbarment proceeding. The broad language used by Congress must, therefore, make the appropriation available, in a case such as this petitioner's, to pay for the transcript if, under the circumstances, a court decides that a transcript is the appropriate means for making up the record.

IV.

Regardless of the Inherent Power of a Court to Aid a Pauper, and Aside from the Meaning of the Act of 1892 as Amended, this Case Should Be Remanded With Instructions Requiring the Preparation of a Bill of Exceptions.

We have already shown that the petitioner was led to believe that he could not have appellate review of the errors he wished to present unless he could buy a transcript. Even if a court cannot order that a transcript be prepared at Government expense, there are other ways to make up a bill of exceptions, and the judge, with the assistance of his secretary who was the official reporter at the trial and whose notes are still available, could cooperate with the petitioner and the district attorney to see that a proper bill of exceptions is presented. See *supra*, pp. 17, 18. The task is much simpler than that set for the parties in *Holmes* v. *United States*, 314 U. S. 583 (1941).

However, the striking thing about this case is that *no one could legally pay the reporter for a transcript.* As a matter of fact, the petitioner has already been wrongfully charged by the reporter for the partial transcript which actually was furnished.[1]

[1] Appendix A hereto shows that the reporter was paid $50 by the petitioner for this portion of the transcript "which sum was also to compensate him for his work during the eight days that the trial lasted".

The court reporter was the secretary to the trial judge, and, as the Government's answer to the petitioner's "Petition for Rehearing" in the Circuit Court of Appeals points out, the Government itself is prohibited from paying a secretary to a trial judge for acting as court reporter or for transcribing notes of testimony at a trial (R. 14). See *United States* v. *Saunders*, 120 U. S. 126, 129 (1887); *Woodwell* v. *United States*, 214 U. S. 82, 88 (1909); 19 Comp. Dec. 760 (1913); 20 Comp. Dec. 731 (1914); 15 Comp. Gen. 828 (1936). But *cf.* 18 Comp. Dec. 132 (1912); 16 Comp. Gen. 909 (1937). *And the Comptroller General has ruled that a secretary to a trial judge in a federal district court may not lawfully be paid by private parties for reporting trials in that court.* 5 Comp. Gen. 650 (1926).[1]

Thus even if this petitioner had been able to pay for the full transcript it could not lawfully have been paid for by him.

In these circumstances, since the reporter is the trial judge's secretary, and therefore subject to the judge's orders, it would appear that the most appropriate course would be for the judge to direct his secretary to transcribe the notes, regardless of the meaning of the Act of 1892.

V.

Even Though a Decision as to the Power to Furnish a Transcript to a Pauper May Prove Unnecessary in this Case, It Would Be Desirable to Notice and Correct the Erroneous Decisions on the Point Heretofore Made by Lower Courts.

There are few subjects of such deep concern to the judiciary as the protection of the poverty-stricken and the

[1] The Comptroller General's ruling was that such a payment would violate a prohibition in 5 U. S. C. A., § 66, against a Government employee's receiving compensation from private sources in connection with his Government work. He also ruled that full-time employment by the Government is inconsistent with devoting time during business hours "to work of a private nature."

ignorant who rely on it for justice. A step somewhat out of the ordinary may be appropriate to further that protection.

Whether or not *United States* v. *Fair*, the cases relying on it, and the Comptroller General, have correctly interpreted the Act of 1892 as amended, *supra*, pp. 27, 34, the decision below should be remanded. *Supra*, pp. 53, 54. Hence it may not be absolutely necessary to determine what power, inherent or statutory, a trial court has to furnish a transcript to a pauper without cost to him. However, such a determination by this Court would certainly be helpful as a guide to the trial court upon a remand of this case.

There is a further reason for making such a determination at this time. If the *Fair* case, and the others, were wrong—as they clearly seem to be—it is high time that the error be rectified. The Comptroller General cuts off payment for a transcript even though a court has decided that it should be furnished at Government expense. *Supra*, p. 46. Only a decision by this Court can correct such action. Moreover, the error in the *Fair* case is persistently repeated in the administration of the business of the United States courts, despite the fact that there is not a single instance where a court has explored the problem with care in the light of the legislative history and having in mind a court's inherent powers as exemplified by the *Gildersleeve* case. *Supra*, p. 28. Indeed, that case has been ignored.

Once before the question was presented to this Court, but upon the Government's agreement to a remand the question was not decided. *Evans* v. *United States*, 312 U. S. 651 (1941), *supra*, p. 46, and p. 39, n. 1. It seems unfortunate that erroneous denial of aid to paupers should be continued until, in the fortuitous course of events, a case happens to appear that compels decision. For in the meantime there must be many able members of the bar who feel that the practice of denying such aid, however errone-

ous in conception, cannot be overcome. And a pauper's case is not likely to encourage pursuit of the long and expensive road to this Court.

The responsibility for correction is not Congress' alone. Congress has twice taken steps which it believed to be helpful—once on the express representation of the Attorney General that *it was thereby fully conserving poor defendants' rights in criminal cases. Supra*, p. 45. The courts and the Comptroller General—not Congress—have failed. This Court should correct the fault.

The fault has put the administration of justice in the United States courts out of step with most of the civilized world. This is in spite of the fact that, in starting the Act of 1892 upon its way in Congress, the House Committee on the Judiciary stated:

> "Many humane and enlightened States have such a law, and the United States Government ought to keep pace with this enlightened judgment." HOUSE REPORT No. 1079, 52ND CONG., 1ST SESS.; *supra*, p. 36.

It is only reasonable to assume that the 1910 and 1922 amendments were similarly inspired.

The enlightened judgment of the community of civilized states and nations is that a defendant's poverty shall not keep him from securing a full record, particularly in a serious criminal case.

The Administrative Office of the United States Courts has recently prepared a memorandum summarizing the answers to a questionnaire sent to the Chief Justices of the several States concerning their systems of court reporting.[1] It concludes:

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[1] The memorandum is entitled *Memorandum Concerning the Answers to the Questionnaire to State Chief Justices in regard to the Systems of Court Reporting in the States.*

"In most of the states the cost of reporting criminal cases of indigent defendants, including transcript if necessary, is paid by the public upon the direction of the court."

A number of the State statutes on the subject are cited in an interesting review in the opinion in *State* v. *Morgan*, 152, Ore. 1, 7, 8. 48 P. (2d) 766, 769 (1935).[1] And, as we have seen, State courts have asserted their inherent power—as did this Court in the *Gildersleeve* case—thus to aid a pauper. *Supra*, p. 24, n. 1.

As this Court knows, in 1941 the Judicial Conference of Senior Circuit Court Judges of the United States, after long study, recommended legislation to correct an inadequate system of court reporting in the federal courts, with provision for furnishing transcripts to indigent criminal defendants at public expense. See REPORT OF THE JUDICIAL CONFERENCE OF SENIOR CIRCUIT JUDGES; ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, pp. 7-8 (1941).[2] See sec. 5a(e) of the proposed bill and the comments in the letter of transmittal from Judge John J. Parker to the Director, Administrative Office of United States Courts, dated October 24, 1941. And the American Law Institute, in its proposed Code of Criminal Procedure, provides for furnishing the transcript in a criminal case without charge. See sections 447 and 450 of the official draft, American Law Institute, CODE OF CRIMINAL PROCEDURE (1930).

In most of the more advanced nations of the world it is provided that the record of the evidence in a criminal case is made up at public expense by officers of the court, so that the defendant is not compelled—as he has been in the United

[1] Some of the statutes are limited to cases involving certain of the more serious crimes.

[2] It is understood that similar action was taken at the 1942 Conference.

States federal courts—in effect to buy a record from the reporter in order to secure appellate review. And in some countries it is also provided that additional copies of the transcript will be furnished to the defendant for his own convenience without cost to him, at least where he is a pauper.

The English *Criminal Appeal Act, 1907*, 7 Edw. VII, c. 23, 4 HALSBURY'S STATUTES OF ENGLAND 734 (1929) at section 16(1), provides for the appointment of an official court reporter who makes a transcript of the evidence in all cases in which an appeal lies. The Act provides that on appeal a transcript shall be made at the direction of the Registrar for the use of the Court of Criminal Appeal or any judge thereof. The cost of taking the notes and the cost of transcripts made at the request of the Registrar are paid "out of moneys provided by Parliament". *Ibid*, sec. 16(3). Thus, a transcript of the evidence is furnished for the court when an appeal is taken whether or not the appellant is a pauper. The English *Criminal Appeal Rules, 1908*,[1] promulgated under the *Criminal Appeal Act, 1907*, provide in Rule 5 that additional transcripts furnished to the parties for their convenience must be paid for; but if the defendant is a poor person the court may, under Rule 39(c), order that such a transcript be furnished to him without charge. *Rex* v. *Davis*, 11 Cr. App. Rep. 52 (Ct. Cr. App., 1914).

In Ireland an official reporter is present at the trial of every person tried on an indictment and takes a shorthand note of the proceedings. The appeal is heard on the transcript of these notes and the appellant may have a copy upon paying the proper fee. If the appellant is unable to pay for a copy of the transcript the court on application may direct that a copy thereof be issued to him free of.

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[1] See ARCHBOLD'S PLEADING EVIDENCE AND PRACTICE IN CRIMINAL CASES (30th ed., Ross and Turner, 1938), 309, 317.

charge under Rule 35 of the Irish Court of Criminal Appeal. Sandes, CRIMINAL PRACTICE PROCEDURE AND EVIDENCE IN EIRE (2d ed., 1939) 182.

In South Africa provision is made by rule of court for including a transcript of the evidence in the record on the trial of a criminal defendant, apparently without prepayment of the cost of such transcript by the accused. I Gardiner and Lansdoun, SOUTH AFRICA CRIMINAL LAW AND PROCEDURE (4th ed., 1939) 701.

The rules of the British courts in Shanghai provided at Rule 21(b):

> "Where a legal practitioner is assigned to an appellant, copies of any documents or exhibits which they or he may request the Registrar to supply shall, without charge, be supplied unless the Registrar thinks that they are not necessary for the purpose of the appeal."

Rule 11 provided that the record on appeal should contain the judge's notes and the depositions taken at the preliminary inquiry, if any. *The China (Criminal Appeal) Rules of Court*, 1914; see W. B. Kennett, CHINA RULES OF COURT (1910) 237, 240.

In South Australia, section 3 (2) of the *Poor Persons Legal Assistance Act, 1936*, 3 Edw. VII, c. 38; 20 & 21 Geo. V, c. 32; 6 Bean and Cartledge, SOUTH AUSTRALIAN STATUTES, (1937) 641, provides:

> "The Attorney-General may by a special or general direction require any officer in the employment of the State to supply, free of cost or such fees as the Attorney-General fixes, to the Society or any practitioner acting for a person a certified or other copy of any document in the possession, custody or control of that officer, if that copy is required in connection with any legal professional work carried out for a poor person.
>
> "In this subsection 'document' includes any transcript or notes of the evidence or arguments in any court."

In India the Magistrate or Session's Judge before whom the accused is tried in the first instance is charged with the duty of taking down the evidence or of dictating it in open court. This duty must be performed in every case and no provision is made for the prepayment of any cost by the accused. The notes become a part of the record available upon appeal. Hari Rao and Krishnaswami Aiyar, CODE OF CRIMINAL PROCEDURE, (2d ed., 1939) 1191 et seq.

In Canada no specific relief for indigent criminal defendants has been found. Apparently, the general rule is that the appellant must bear the cost of transcribing the stenographer's notes in order to make up a record on appeal. *Rifken* v. *Rex*, 40 Que. K. B. 537 (1926). But *quaere* whether relief may not be available in a case such as this petitioner's under the procedure which provides that the Minister of Justice[1] may direct that a copy of the transcript of the evidence be furnished him in appropriate cases, REVISED STATUTES OF CANADA (1927), c. 36 sec. 1021 (4), and further that the Minister of Justice may refer a proper case—presumably including his file on the case—to the appellate court where it is reviewed as though the accused had appealed to that court, REVISED STATUTES OF CANADA (1927) c. 36, secs. 1021-1022. See Crankshaw, CRIMINAL CODE OF CANADA (6th ed., 1935) secs. 1021-1022; SNOW, CRIMINAL CODE (5th ed., 1939) secs. 1021-1022.

In the Republic of China provision is made for a clerk who incorporates notes of the evidence into the record. In the absence of the clerk, this function is performed by the Public Officer who examines the witnesses. This record is made in each case with no provision for prepayment of any costs by the accused. CODE OF CRIMINAL PROCEDURE OF THE REPUBLIC OF CHINA, article 41 et seq. (1936).[2]

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[1] The Minister of Justice acts for the Crown in this connection.

[2] This Code is found in English translation, by the Legal Department of the Shanghai Municipal Council, in the Library of Congress.

In Russia, a secretary of the court, paid by the state takes minutes of the trial proceedings and evidence which go into the record on appeal; the Soviet code provides generally for assessment of costs, except that in connection with the trial of a poor person, the total expense of which is borne by the state. Zelitch, SOVIET ADMINISTRATION OF CRIMINAL LAW, pp. 213, 228 (1931).

Counsel regret their inability to ascertain the exact practice and procedure in other nations. Translations of the criminal procedural codes do not appear available nor have we found satisfactory secondary sources in print. We have, however, consulted with Dr. Vladimir Gsovski, Foreign Law Librarian of the Library of Congress, who is understood to have studied law in the principal Continental countries. He informs us that generally on the Continent the evidence, or pertinent portions, is recorded by a court official as it is given, that his salary is paid by the state, and that the record he makes goes to the appellate tribunal without cost to the defendant. In Dr. Gsovski's discussion with us he made rough oral translations from the codes of the Russian Soviet Federal Socialist Republic, Germany, France and Italy. Moreover, in France, at least, each defendant is apparently furnished without charge with one additional copy of the transcript for his own use whether or not he is a pauper. *Code d'Instruction Criminelle* (1940) Art. 305. Compare the provision for poor persons in the Brazil code. *Código do Processo Penal* (1942) art. 806 § 1.

Thus it can be asserted with some confidence that, among the principal nations, only in the United States courts does one encounter a system which denies a full record to a criminal defendant because he is too poor to buy one.[1]

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[1] There is some reason to believe that, despite the Comptroller General and the current of lower court decisions which have followed the *Fair* case, some of the federal officials have insisted upon protecting paupers. For instance, we understand that in the United States Court for the District

The evil in such a system is one which students of the law have long condemned. Lindsay, *Necessity for a Court of Criminal Appeal*, REPORT OF NEW YORK BAR ASSOCIATION, VOL. 33, pp. 34, 39 (1910); Smith, JUSTICE AND THE POOR, p. 8 (Bull. 13, Carnegie Found. Advance. Teach., 1919); Wigmore, *Some Lessons for Civilian Justice to be Learned from Military Justice*, 10 JOURNAL OF THE AMERICAN INSTITUTE OF CRIMINAL LAW AND CRIMINOLOGY 170, 173 (1919); Millar, *The Modernization of Criminal Procedure*, 11 JOURNAL OF THE AMERICAN INSTITUTE OF CRIMINAL LAW AND CRIMINOLOGY 344, 366 (1920); Orfield, *Appeals by Indigent Criminals*, 3 UNI. OF PITTSBURGH LAW REVIEW 1 (1936). It is extraordinary that in the military judicial process there exists no such evil as that which still plagues the federal courts of civilian justice. Dean Wigmore noted the fact long ago:

> "In Federal military justice every record of every case goes up to at least one higher authority; and all records of general courts-martial go up two stages • • • Every convicted man thus obtains an appellate scrutiny; and this he obtains without any cost, paying no counsel fee and no transcription expense.
>
> "This is an ideal of which civilian justice has been dreaming ever since Magna Carta. Complete justice to the poor man is still a dream in our civilian courts. In the military courts, it is already a fact. And it costs not a cent • • •

---

of Columbia the district attorney has arranged to have a reporter take the testimony in all capital cases and that two copies of a transcript are always prepared, whether or not an appeal is taken. One copy is furnished to the judge and one to the district attorney, but if there is an appeal one of the copies, and sometimes both, are certified. The entire cost is paid by the Government. Similar practices probably exist in some other districts. As a matter of fact, after the decision of the Comptroller of the Treasury in 26 Corp. Dec. 362 (1919), *supra*, p. 43, the Department of Justice advised a district attorney, whose request for permission to print a pauper's record had led to the Comptroller's ruling, that he could pay for the printing, despite that ruling, by having the matter specially taxed against the Government under 28 U. S. C. A. § 577.

"Here is an object lesson for civilian justice." See *Some Lessons for Civilian Justice to be Learned from Military Justice, op. cit., supra*, at p. 173.

The recent case of the Nazi saboteurs strikingly illustrates Dean Wigmore's statement.

Our own military law, then, as well as the civilian law of other nations and of most of the States, and the opinion of the judiciary, the bar, and the academicians, all show an enlightened judgment which in the United States courts has not been reflected in practice. A two page decision by a District Court in 1916 has been followed uncritically. *United States* v. *Fair, supra*, pp. 37, 46. This Court's and many other courts' decisions asserting an inherent power in the judiciary to provide fair treatment of the poor have been ignored. *Supra*, pp. 20-34. The effort of Congress to assure "that poor defendants' rights in criminal cases may be fully conserved", *supra*, p. 45, and that the United States keep pace with a humane and enlightened judgment, *supra*, pp. 36, 56, has been defeated.

It is submitted that this Court should, in reversing the decision below, reestablish the power to protect the indigent.

Respectfully submitted,

HOWARD C. WESTWOOD,
CHARLES M. DAVISON, JR.,
Counsel for Petitioner.

APPENDIX A.

Letter from Counsel Who Represented Petitioner at His Trial and in the Circuit Court of Appeals.

"PHILIP G. ALSTON
Attorney at Law
Texarkana, Arkansas
September 21 1942

"Mr. Howard C. Westwood
% Covington, Burling, Rublee,
Acheson and Shorb
Attorneys at Law
Union Trust Building
Washington, D. C.

In re: J. W. Miller, petitioner, vs. United States, Supreme Court of the United States, October Term 1942,—No. 76.

"Dear Mr. Westwood:

"Your interesting letter has been received by me, and I am hastening to give the matter attention. I agree with you that the point involved is an extremely important one, and one which I expect the Supreme Court will definitely pass upon in the Miller case.

"As to whether or not Miller properly raised the question in the lower court, I will state to you in a general way what took place, and then will endeavor to answer your specific questions.

"As soon as Miller was convicted we filed a notice of appeal, in which we set up several grounds, among them that the verdict of the jury was contrary to the evidence. When we got ready to perfect the appeal Mr. Woods and I made inquiry of the District Attorney and the court reporter as to the possibility of obtaining the entire transcript of the testimony, so that every question could be raised on appeal. From our conversations with these officials we

formed the opinion that Miller had no right to have all of the testimony transcribed at Government expense, and we advised Miller that unless he was in a position to pay the court reporter for preparing this transcript he would be unable to raise any questions on his appeal which would require the transcribing of the testimony. Mr. Miller thereupon informed us that he thought he could get up about $100.00. I contacted the court reporter and informed him of this fact and made an arrangement with him whereby he was to transcribe a sufficient amount of the testimony to raise the question as to whether or not Miller was a 'parent' within the meaning of the exception contained in the Lindbergh law, for the sum of $50.00, which sum was also to compensate him for his work during the eight days that the trial lasted, the other $50.00, with Miller's full knowledge and consent, was used by Mr. Woods and myself as an attorney's fee.

"The court reporter told us that it would cost several hundred dollars to transcribe all of the testimony in the case, and as such a sum was obviously out of Miller's reach, no effort was made to have the reporter transcribe it all.

"It was pointed out to Miller that under the law as we understood it, he was not entitled to have a transcript of the testimony prepared for him at Government expense, and for that reason his appeal would be limited to the one point above mentioned. Mr. Miller never made any formal motion or request to the District Court for a transcript of all of the testimony, and his Pauper's Oath and the order thereon were couched in general terms.

"Passing now to some of your specific questions:

"1. I do not have an extra copy of the brief filed by me in the Miller case.

"2. To the best of my recollection, the question as to whether or not the evidence in the case sustained the verdict was not referred to except in the original notice of appeal.

"I do not know what Miller wrote Judge Lemley on April 18, 1941, and I do not know whether or not Judge Lemley would be inclined to furnish copy of this letter, but I will ask his Secretary about it today. Straining my recollection,

I recall that Miller said in this letter that the evidence was very weak, and that he did not believe that a case of kidnapping had been proved against him.

"3. Mr. Miller, directly after the trial, wanted to appeal on all possible grounds, and abandoned that position only when it was explained to him that we felt that this was impossible. After he elected to start the serving of his sentence pending the disposition of his appeal, he wrote me a number of letters in which he urged me to insert in my brief 'affidavits' that he was innocent. His letters also urged that the question of the insufficiency of the evidence be argued in the brief. As he has sent you the letters which I wrote him, I need not take up time to explain what I wrote him.

"4. There is nothing in writing evidencing any of the discussions between Mr. Woods and myself on the one hand and the District Attorney and the Court Reporter on the other, concerning the obtaining of a transcript of the testimony. All of the conversations were oral, and I feel have been fully set forth in the preceding paragraphs.

"5. Mr. Williams, the Official Court Reporter, was not paid by the Government for any of his work, but was paid $50.00 of the $100.00 which Miller raised. As far as Mr. Williams' status is concerned, he serves as the Official Court Reporter, but as to whether or not there is any court order making him such, I do not know. He has never been paid, as far as I know, by the Government for acting as reporter in any trial, and I know he was not paid by the Government for reporting this trial. Had the District Attorney desired a full copy of the transcript he would have to had paid for it.

"Trusting that this letter will answer at least some of the questions asked in your letter, I remain,

Very truly yours,

(Signed) PHIL G. ALSTON,
Attorney at Law.

PGA/ehl.

APPENDIX B.

Letters from Petitioner to the Trial Judge, Copies of Which Have Been Furnished by the Judge's Secretary, at the Judge's Direction.

"Thur. 6 (Feb. 6, 1941).

"Miller Co. Jail

"Honorable Juge:

"Dear Sir: I wonder if you would be so kind to consider this letter. It is a long time to be away from my children, for I think more of them than I do of myself. I wanted to give them a eguention, and if I wer guilty of the crime it would be diferent. I would not ask anything. I wish you would grant me a cut so I could have a chance to do something for them, as I would be so old and broke down I couldnt help them. I wanted to explain to you but I was afraid it would make you *mad*.

"Juge, if you would give me som kind of clemsey, I say give me 20 years on prole, or any kind you see fit, so if I made a crooked move I would have to do it.

"Please consider *this*, I would give my life to be able to give those little children an advantage of life.

"If I am guilty of this crime I don it in ignorance. So please forgive me and please dont git mad for I wanted to explain.

"Yours sencear,

(Signed) J. W. Miller,

Jessie William Miller.

* * *

"May 16th, 1941,
Hope, Ark.

"From: J. W. Miller
58098

"To: Hon. Harry J. Lemley

"Special Purpose

"Your Honor, I beg your pardon for bothern you, however, it means to much to me. I want to explain a few

things to you. If you remember the testimony in my trial, the most importent goverment witness in my tryal was Dr. Hendrix of DeQueen, Ark., an who admited the reason he dident doctor the girl when she arived was becose he knew she an her husban had trouble and was afraid he, Will Garner, would use a .45 on him. Therefore he called in the law, an that was the point of which she stated to us in her letter which was shown by Mr. Raymon Russell an his son. Mrs. Hendrix testified the girl had such pretty brown curley hair, of which the girl never in her life had brown curley hair. And if she did have a fractured arm how could I be responsible for it, after she hitch hiked 200 miles, of which lots of people gets their car and life taken away from them on the highway, an which was shown by respectable people, Mr. McClure and Mr. Fields who seen the girl last an talked to her just before she got in the car, within 150 feet of our house, and left the littel boy with Mr. Fields to keep until we came in. An she was carrying a bundle of close on one arm an the baby on the other, an was not beat up or hurt in any way when she left.

"An it was shown by Mr. Bookout an Mr. Rusell, an son, an Mrs. Rusell, an Mr. Fields, an Mr. McClure, she went to town and was seen at diferent places over town, an Mrs. Russell testimony showed she talked to the girl 15 blocks from our house and she told her the reason she dident stay with her man was he wasent what she thought he was. An she was lookin for work at the time an I wer not around. Mr. Bookout testimony was, he talked to her in the corthouse at Sherman, Tex. an she was going to the doctor for medicine an I wer not around, an he had seen her diferent times over town an if I wer so cruel to her, why would I let her go over town with broken arm an skined head. I could have had 50 or more people ho had seen her going about like any one else, if the goverment would have allowed it. An at McKinney, Tex. where we first stopped, Mr. Hartline and wife testified she was treated like the rest of the famley, an she never said anything about any trouble to them an never even ask them to right a letter for her. An the both of them and wife and I went to town an left her with the children an never returned untill late at night. She could have left them. An she wasent mistreated then.

"Mr. B. R. Harless and C. C. Harless, of Snyder, testimony for the goverment, stated, he heard me whipen her 150 yards an she was able to work that morning, an she wasent crying an she came out of the house and stood by the dore, an all he seen was her sore hands. An C. C. Harless claimed he heard her an I wer whipen her 150 yds and he was in bed an it woke him up, with the dores closed, and still she worked that morning. You know a mule or a man couldent have worked or anything else, beaten up like that. An said they told the law an the law wouldent do anything. You know it is a very pore law and a pore man who wouldent have don something about it, but amitted their was pea hulls in the house after we left, and the racket he heard sound like beeting a matress. An beeting a human wouldent sound like beeting a matress. We wer beeting peas out, while the due was on the cotton.

"If I had a crimnal enfent I would have had someone or ones who would have been with me all the time, besides my family. The reason of their testimony was, becose he was mad, for the reason we dident finih pickin his cotton, an he could get a hundred or mor dollars out of the goverment.

"Now at Snyder, Tex. at the time I wer arested. I wer in jail and the girl wer taken before the County atorney an sherif force an in his office an never told them about bein beaten up and fooled away from home, an the doctor examined her very close and dident find anything, broozes or whelps, an she could told them, an I were not around, an she or any girl of 17 knows what the law ar for. An the doctor said she had polegra an unbalance and turned me aloose. An the scar on her hip was when she hoped of the car and slid down in the grass an which ar very poison, an her system bein in bad condshion, made a sore an which the M. D. stated. I cannot understand why those people couldn't find out of anything being rong.

"Now back to Sherman, Tex. when I wer arested an in jail an the health oficer came out an talked with her. An when I wer arested Joe Hall an R. C. Slagle came out. Joe Hall testimony was she had a bloody rag on her head and the meat was stomped out to the bone in the bottom of her feet. An she was up walkin around with shoes

on the next day. He also said R. C. Slagle gave me a cussin in my house, an he was the district attorney at the time. The girl said she had sun sores on her ankles and a little place on her head—didnt say she had a bloody rag on her head, an said she never heard any cussin their. An the sore on her head was from a risen an about the size of a quarter. R. C. Slagle never maid a statement like that; he said we looked like por transent people, an the girl was sittin down in the floor or box and got up and walked around and had som ole sores on her ankles. An she an the baby was very dirty and he said she was in the house. An Hell said she werent when they came up. She said she was. An Mr. R. C. Slagle said she was: And the reason he dident prosecute me there wasent any one who would apear. An if so why dident she or ho had it don? proscute me? An why did she signa sworn statement? I never had mistreated her in her life. An I were not present when she don it. The reason those woodcutters don what they did, was I had contracted a strip of timber an they wanted it an got it. An why dident they have them before the Cort? An why dident they prosecute me? Becose it wasent so an they knew it. An they had got the timber.

"I say it is a very pore mother who would stand for such to hapen to her own child. An a very poor law who couldent find anything rong; Yor Honor, if I had a crimnal intent why should I let her roam around anywher, beet or bunged up, like that? If I had knew it would have bin like this, I could have had 50 more witness to shoed more as to my part. However, I thought right would win.

"An Mr. H. T. Arterberry, F. B. I., couldnt find anything rong when investigated us, threw the chief of pleace an his self, an he said when he came out to envestagate, she wasent at home; an he went away an return an talked to the girl when she came in. An she throwed a hissey an said Will Garner, the one ho was cosin the trouble, an raved about him doing so, an I wer not present. I feel like the FBI could found out if there wer anything rong, an he said he dident find out, and left.

"I have gave the testimony on both sides as close as possible. Mr. Fred Cotton ho testified she was treated

like the rest of us, an we went to town diferent times an left her an the children at his place. An she got watter at the back of his house before an after dark. An she never said anything to them about any trouble. An he never seen anything rong or heard any whippen or cussin) (So please reed this very closley and consider it the same, an I feel like you will com to the conclusin, I am an inson man.

"Your Honor, I know I could have lost my life over this, an if I wer guilty of such crime I would think you had gave me a birthday present, an wouldn't have nerve enough to apeal to you for help. I realize I am not very brite, but I do no when I do the rong thing, and the reason I did go after the child was for the love of her mother, an the respect of the girl. I relize it wouldent looked so good for you to have taken the case out of the Juriors hands and decided it yourself. An if you rember durin the trial of the comotion among the witness in the hall, which J. O. Garner, plantif brothr, caused, an he was on the Jurior list of the year, an I feel like the Juriors did not go by the evidence in the case. So please consider this very close an give me the benefit of the dout, as I am an inosent man, an please let me hear from you. Hopin you will take steps to help me.

"Very sencear, please help me,

(signed) J. W. Miller,
Box PMB 58098
Leavenworth, Kansas

APPENDIX C.

28 U. S. C. A. §§ 832-836—The Act of 1892 as Amended

The *in forma pauperis* statute, 28 U. S. C. A. §§ 832-836, was originally adopted as the Act of July 20, 1892, c. 209, 27 Stat. 252. Section 1 was amended by the Act of June 25, 1910, c. 432, 36 Stat. 866, and was further amended by the Act of June 27, 1922, c. 246, 42 Stat. 666. The following shows the Act as adopted with successive changes

therein. The Act as adopted in 1892 appears in light face roman type. The additions made by the 1910 amendment are shown in italics, and the deletions made by that amendment are shown by single lines stricken through words deleted. The additions made by the 1922 amendment are shown in **bold face** type, and deletions by double lines stricken through words deleted.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any citizen of the United States entitled to commence ~~or defend~~ any suit or action, *civil or criminal*, in any court of the United States, may, *upon the order of the court*, commence and prosecute *or defend* to conclusion any ~~such~~ suit or action, *or a writ of error, or an appeal to the circuit court of appeals, or to the Supreme Court in such suit or action, including all appellate proceedings, unless the trial court shall certify in writing that in the opinion of the court such appeal or writ of error is not taken in good faith*, without being required to prepay fees or costs *or for the printing of the record in the appellate court* or give security therefor, before or after bringing suit or action, *or upon suing out a writ of error or appealing*, upon filing in said court a statement under oath in writing, that because of his poverty he is unable to pay the costs of said suit or action ~~which he is about to commence~~ *or of such writ of error or appeal*, or to give security for the same, and that he believes *that* he is entitled to the redress he seeks ~~by~~ **in** such suit or action *or writ of error or appeal*, and setting forth briefly the nature of his alleged cause of action, *or appeal*: **Provided, That in any criminal case the court may, upon the filing in said court of the affidavit hereinbefore mentioned, direct that the expense of printing the record on appeal or writ of error be paid by the United States, and the same shall be paid when authorized by the Attorney General.**

"Sec. 2. That after any such suit or action shall have been brought, or that is now pending, the plaintiff may answer and avoid a demand for fees or security for costs

by filing a like affidavit, and wilful false swearing in any affidavit provided for in this or the previous section, shall be punishable as perjury is in other cases.

"Sec. 3. That the officers of court shall issue, serve all process, and perform all duties in such cases, and witnesses shall attend as in other cases, and the plaintiff shall have the same remedies as are provided by law in other cases.

"Sec. 4. That the court may request any attorney of the court to represent such poor person, if it deems the cause worthy of a trial, and may dismiss any such cause so brought under this act if it be made to appear that the allegation of poverty is untrue, or if said court be satisfied that the alleged cause of action is frivolous or malicious.

"Sec. 5. That judgment may be rendered for costs at the conclusion of the suit as in other cases: Provided, That the United States shall not be liable for any of the costs thus incurred."

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CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 76

JESSIE WILLIAM MILLER,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

REPLY BRIEF FOR PETITIONER.

HOWARD C. WESTWOOD,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 76

JESSIE WILLIAM MILLER,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

REPLY BRIEF FOR PETITIONER.

The respondent's brief (pp. 35-36) seeks to distinguish the state decisions cited in the petitioner's brief (p. 26) asserting that without statutory authority therefor, a court can require that an indigent defendant in a criminal case be furnished with a transcript, for the purpose of his appeal, at public expense. The respondent refers to certain statutory provisions in effect in the various states at the time of the decisions cited which seem to it to make these decisions consistent with its position in this case.

State v. *Klein*, 95 Conn. 451, 112 A. 524 (1920), was a criminal case in which the accused, a pauper, in connection with his appeal moved the appellate court to "certify all of the evidence in said cause and make it a part of the record and print the same at the expense of the state".

The Court pointed out that a state statute provided that the appellant must present to the trial court "all of the evidence desired to be certified at his expense" and must pay for printing the record; but it held that this statute would not control in the case of poor persons who, it was said, had always been provided for by the courts. Accordingly the court, under its general power to care for the poor, held that an indigent defendant in a criminal case could, in the court's discretion, be furnished with a transcript and a printed record for the purpose of his appeal at public expense.

Section 2229, *General Statutes of Connecticut* (Revision of 1918) referred to by the respondent (Br. 35), provided for an official stenographer and set his fees. One copy of the transcript was furnished to the court with an additional copy to each of the parties. The stenographer's fees for these services, including travelling expenses in certain instances, were taxed and paid as other court expenses.

Section 6681 of the same revision provided that "The defendant in any criminal case shall pay the costs of his conviction before he shall be discharged".

The opinion in the *Klein* case makes no reference to either of these sections. If reference had been made it would necessarily have been limited to a comment that the court's ruling was made in spite of—certainly not under authority of—these sections.

Jeffries v. *State*, 9 Okla. Cr. 573, 132 Pac. 823 (1913), was a criminal case in which the accused, acting through appointed counsel, sought a transcript of the evidence in order to perfect an appeal. The court agreed with the point made by the state that a transcription of the stenographer's notes was not the only means by which the record on appeal could be prepared. The court also stated that if counsel are employed by the accused, "it is their duty to

use their best exertions to make up a case-made from memory, and if they do not do so, the defendant will be held responsible for this neglect of duty on their part". But the court said the case was different when appointed counsel served, and held that the transcript could be furnished without expense to the accused.

As indicated in the respondent's brief (p. 36) sections 1785-1788, *Oklahoma Revised Laws* (1910), at the time the *Jeffries* case was decided, provided for official court reporters and required them to furnish transcripts to paupers free. But the court in its opinion in the *Jeffries* case chose not to rely on these sections—no mention is made of the sections in the opinion—but rather based its decision on the fundamental constitutional right. In the course of its opinion the court said:

> "It is a violation of both the letter and spirit of this provision of the Constitution to require any man to pay any costs of court if he is a pauper and without the means of doing so, and to deny him the issuance of such process or the services of the officers when he is unable to pay for the same. In other words, justice in Oklahoma is the right of the poor as well as the luxury of the rich.
>
> * * * We want the people of Oklahoma to understand, one and all, that the poorest and most unpopular person in the state, be he white or black, can depend upon it that justice is not for sale in Oklahoma, and that no one can be deprived of his right to appeal simply because he is unable to pay a stenographer to extend the notes of the testimony". (132 Pac. at 823, 824)

A similar conclusion was reached by the court in *State ex rel Parmenter* v. *District Court of Ravalli County*, 111 Mont. 453, 455, 110 P. (2d) 971, 972, (1941), where a state statute on the subject was found to be merely a recognition of the fundamental constitutional guarantee.

In re Morgan, 122 Ind. 428, 23 N. E. 863 (1889), was a criminal case in which the accused was denied a transcript of the evidence by the trial court. The appellate court affirmed the denial on the ground that the accused was not entitled to a transcript as a matter of right—that the matter was within the discretion of the trial court, but pointed out that a case might arise in which it would be error not to make an "allowance" for the payment of the cost of preparing a transcript of the stenographer's notes.

As indicated in the respondent's brief (p. 36), Section 1405 *Indiana Revised Statutes* (1881), at the time of the court's decision provided for salaried court reporters, and Section 260 required court officers in a pauper's case to "do their duty without taking any fee or reward therefor from such poor person".

Section 260 also provided for the appointment of counsel for poor litigants, including criminal defendants, and provided that counsel should also serve without reward from "such poor person". Comparing the holding in *Knox County Council* v. *State*, 217 Ind. 493, 29 N. E. (2d) 405 (1940), and the earlier cases cited therein that counsel appointed to conduct the defense of a poor person accused of crime cannot by statute be required to serve without compensation but, regardless of statute, will be paid by the state (Petitioner's Brief pp. 24, 26) with the language of the court in the *Morgan* case that upon a proper showing an "allowance" could be made for the cost of transcribing the stenographer's notes, we must conclude that the court in the *Morgan* case was not referring to the existing statutes, but rather, as it did in the *Knox County* case, was finding a broad, inherent power in the courts to do justice without reference to specific legislative directives on the point, even though expenditures of public funds might be necessary.

The respondent cites certain other state decisions (Br. 53) as holding in the absence of statute that a defendant in a criminal case will not be furnished with a transcript of the evidence at public expense.

State v. *Vicknair*, 118 La. 963, 43 So. 635 (1907), was a criminal case in which the accused instead of securing the services of the official court reporter had brought his privately employed stenographer to court for the purpose of taking notes on the testimony. The prosecuting officer objected to this procedure at the opening of the trial. When the accused found himself unable to pay his stenographer for transcribing the notes, he requested the court to order the stenographer to perform this service without charge.

The court, after referring to the fact that the stenographer involved was not the official court reporter, ruled that it had no authority as between the private parties concerned to require one to perform services for the other without charge. In affirming, the appellate court said:

> "Inasmuch as the stenographer was the private stenographer of the accused, working under a private agreement with him, we do not see how the judge could have ruled differently." 43 So. at 639.

There was no discussion or analysis of the court's power in the event the stenographer had been the official court reporter. The inference that the ruling might have been different is clear.

Altis v. *State*, 109 Neb. 776, 192 N. W. 327 (1923), was a contempt proceeding arising out of a failure to pay support money in a divorce action. The court specifically refused to pass on the question whether the contempt proceeding was a criminal action.

Contrary to the implication in the respondent's brief (p. 53) this case was principally concerned with the interpretation of a statute under which the trial court was given

discretion to order a transcript of the stenographer's notes at public expense. The principal question discussed by the court was the extent of the discretion left to the trial judge. The court held that the statute provided only that the trial court "may" make the allowance and that the trial court was not under obligation to incur the expense in every case. The court in stating its conclusion said:

> "If, however, the proof is sufficient to support the application, then, of course, it is the duty of the court or judge to grant the order." 192 N. W. at 328.

In passing the court said that the relief sought was statutory, but since the statute in question merely restates the inherent power of the court, it is submitted that the case is hardly an authority for the respondent's position here.

The respondent also states in brief that *United States* v. *Gildersleeve*, 193 U. S. 528 (1904), is not contrary to its position here since the moneys involved were the clerk's statutory fees under R. S. 828. The respondent implies that it is unimportant that the record in that case in the Court of Claims [1] shows that work performed by the clerk in earning these fees involved preparing a transcript of the stenographer's notes on the evidence since this court considered the matter solely from the point of view of the statutory fees.

In the *Gildersleeve* case the respondent's brief in this Court shows very clearly that this Court knew that the services performed by the clerk were not his usual services in preparing a record on appeal. The respondent stated in his brief that "he would probably not have the time in connection with his own duties to prepare the transcript per-

---

[1] Pertinent portions of this record are included in this reply brief as Appendix A.

sonally, and would have to employ and pay a copyist to do the work". Moreover, the respondent in his brief referred to the case of *Goodrich* v. *United States*, 42 Fed. 392 (E. D. Ark., 1890), where the fees for making transcripts required by Section 10 of the Act of March 3, 1887, 24 Stat. 507, when ordered by the district attorney were held to be chargeable to the United States. A reference to the statute referred to in the *Goodrich* case discloses that the transcript involved there included a transcript of the evidence.

Consequently the *Gildersleeve* case recognized and approved the exercise by a district court of its inherent power to provide an indigent defendant in a criminal case with a transcript of the evidence for the purpose of his appeal at public expense. That the payment therefor was to occur through having the Government pay fees to the clerk, who in turn would have to pay for the work of transcription, is immaterial.

The respondent makes much of the fact that specific statutory authorization is necessary for expenditures of the nature desired by the petitioner in this case (Br. 28-38).

But courts have frequently asserted an inherent power to incur expenses necessary to the conduct of their business. *Stowell* v. *Jackson*, 57 Mich. 31, 23 N. W. 557 (1885), involved the action of the trial court in segregating the jury and ordering that the hotel expenses incurred in such segregation be paid by the state. In the course of an opinion approving this expenditure, the appellate court said:

> "It is within the legislative power to arrange specifically how all these matters should be disposed of; but as the law now stands, the inherent power and duty of courts to exercise their functions must authorize such action as becomes expedient in the course of judicial business.
>
> "The fact that there are not many authorities on this subject rather tends to indicate acquiescence in this practice than otherwise. * * *" 23 N. W. at 558.

See also *In re Janitor of Supreme Court*, 35 Wisc. 410 (1874), court may appoint janitor at public expense; *Board of Commissioners* v. *Gwin*, 136 Ind. 562, 36 N. E. 237 (1894), court may order repairs to court house; *State ex rel Kitzmeyer* v. *Davis, State Controller*, 26 Nev. 373, 68 Pac. 689 (1902), court may order furniture for courtroom; *Knox County Council* v. *State*, 217 Ind. 493, 29 N. E. (2d) 405 (1940), court may order county to pay appointed counsel. Such cases as *Sargent* v. *State*, 11 Ohio Rep. 472 (1843); *Fernekes* v. *Supervisors of Milwaukee County*, 43 Wisc. 303 (1877); and *County Commissioners of Alleghany County* v. *County Commisisoners of Howard County*, 57 Md. 393 (1882) illustrate the inherent power in the courts to incur expense in connection with feeding and caring for jurors. Compare *United States* v. *Fox*, 19 F. Supp. 463 (S. D. N. Y., 1937), where it was held that a court may require that compensation for the services of a pauper defendant's expert witness in a criminal case be paid from the appropriation for miscellaneous expenses of the United States Courts, relying upon the spirit of 28 U. S. C. A. §656; and 21 Comp. Gen. 347 (1941), where Comptroller General ruled that the appropriation for miscellaneous expenses of the United States Courts would be available to pay expense of taking a deposition of a witness for a pauper defendant in a criminal case (including stenographic transcription) where witness is within the territorial limits fixed by 28 U. S. C. A. §656.

Respectfully submitted,

HOWARD C. WESTWOOD,
CHARLES M. DAVISON, JR.,
Counsel for Petitioner.

APPENDIX.

Portions of Record in Court of Claims in the case of *Gildersleeve* v. *United States*

In the District Court of the First Judicial District of the Territory of New Mexico:

No. 1620

THE UNITED STATES OF AMERICA

vs.

JAMES ADDISON PERALTA REAVIS.

Conspiracy.

The Clerk of the First Judicial District Court of the Territory of New Mexico will please immediately prepare a full, true and complete transcript of all the proceedings in the above entitled cause, for review in the Supreme Court of the Territory of New Mexico, consisting of all the pleadings, exhibits and record entries, and testimony in connection with the trial of said cause, and will also cause all the stenographers' minutes to be transcribed.

CHARLES A. SPIESS,
Attorney for Defendant.

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE TERRITORY OF NEW MEXICO.

No. 1620

THE UNITED STATES OF AMERICA

vs.

JAMES ADDISON PERALTA REAVIS

Conspiracy.

James Addison Reavis being duly sworn on his oath says, that he is the plaintiff in error in the case of *James Addison*

Reavis v. *The United States of America*, in which case a writ of error has been sued out from the Supreme Court of the Territory of New Mexico, to the District Court of the First Judicial District of the Territory of New Mexico; that he is informed that the fees of the Clerk of said District Court for making and certifying a complete record in said cause will be about $400.00; that he is entirely without means with which to pay the said Clerk for such service, and that he knows of no source from which he can procure or obtain the amount or any amount of money to defray the expenses in perfecting his said appeal to the Supreme Court of the Territory of New Mexico; and that if he cannot obtain the said transcript of said record without paying the Clerk of said District Court his said fees therefor, he will not be able to present his said cause to the said Supreme Court.

(Signed) JAMES ADDISON REAVIS.

Subscribed and sworn to before me this 28th day of October, A. D. 1896.

GEORGE L. WYLLYS,
Clerk of the District Court of the First Judicial District of the Territory of New Mexico. (*Seal of District Court.*)

No. 1620

THE UNITED STATES

vs.

JAMES ADDISON REAVIS, Alias James Addison Peralta-Reavis, Alias James Addison Peraltarieaves, and Jose Migiul Noé.

Conspiracy.

Upon reading the affidavit of the defendant and it being made to appear to the satisfaction of the court that the said defendant, James Addison Reavis, is unable to provide funds for the preparation of the transcript of record of his

said case for review by the Supreme Court of the Territory of New Mexico;

It is ordered by the court that the Clerk of this court prepare said transcript with all convenient speed and transmit the same duly certified to the Clerk of the Supreme Court of the Territory of New Mexico.

(Signed) N. B. LAUGHLIN,
Associate Justice, etc.

UNITED STATES OF AMERICA,
Territory of New Mexico,
First Judicial District:

I, A. M. Bergere, Clerk of the First Judicial District Court of the Territory of New Mexico, do hereby certify that the foregoing three pages contain a true, correct and complete copy of the Poverty affidavit, Praecipe for transcript and Order for Clerk to Prepare Transcript in cause No. 1620 United States Court, in which the United States of America was plaintiff and James Addison Peralta Reavis was defendant.

In Witness Whereof, I have hereunto set my hand and the seal of said court at my office in the City of Santa Fe, County of Santa Fe and Territory aforesaid this 14th day of January, A. D., 1902. * * * (Seal of District Court.)

(Signed) A. M. BERGERE,
Clerk, U. S. Court.

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CLERK

No. 76

In the Supreme Court of the United States

OCTOBER TERM, 1942

JESSIE WILLIAM MILLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION TO THE GRANTING OF THE PETITION FOR A WRIT OF CERTIORARI

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OPINIONS BELOW

The opinion of the circuit court of appeals affirming the judgment of conviction (R. 88–89) is reported at 123 F. (2d) 715. Its initial opinion on petition for rehearing (R. 99–100) is reported at 124 F. (2d) 849. Its opinion denying the petition for rehearing (R. 125–127) is not yet reported.

JURISDICTION

The judgment of the circuit court of appeals was entered November 25, 1941 (R. 90). The petition for rehearing was denied March 25, 1942 (R. 125–

127). The petition for writ of certiorari was filed April 21, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Rules in Criminal Cases promulgated by this Court on May 7, 1934.

QUESTION PRESENTED

Whether a defendant in a criminal action may require the Government to furnish a transcript of the testimony for the defendant's use on appeal in *forma pauperis* where a shorthand record of the testimony was taken by the trial judge's secretary but was transcribed only in part.

STATUTE INVOLVED

The *forma pauperis* statute as amended provides (Act of July 20, 1892, c. 209 § 1, 27 Stat. 252, 36 Stat. 866, 42 Stat. 666; 28 U. S. C. 832):

> Any citizen of the United States entitled to commence any suit or action, civil or criminal, in any court of the United States, may, upon the order of the court, commence and prosecute or defend to conclusion any suit or action, or an appeal to the circuit court of appeals, or to the Supreme Court in such suit or action, including all appellate proceedings, unless the trial court shall certify in writing that in the opinion of the court such appeal is not taken in good faith, without being required to prepay fees or costs or for the printing of the record in the appellate court or give security therefor, be-

fore or after bringing suit or action, or upon appealing, upon filing in said court a statement under oath in writing, that because of his poverty he is unable to pay the costs of said suit or action or appeal, or to give security for the same, and that he believes that he is entitled to the redress he seeks in such suit or action or appeal, and setting forth briefly the nature of his alleged cause of action, or appeal. In any criminal case the court may, upon the filing in said court of the affidavit hereinbefore mentioned, direct that the expense of printing the record on appeal be paid by the United States, and the same shall be paid when authorized by the Attorney General.

STATEMENT

On February 3, 1941, after a jury trial lasting several days, petitioner was convicted of kidnapping in violation of the Act of June 22, 1931, as amended, 47 Stat. 326, 48 Stat. 781; 18 U. S. C. 408a (R. 6). A verdict of not guilty was directed as to his wife, who was a co-defendant (R. 63). Petitioner was sentenced to seven years' imprisonment (R. 7). The sentence later was reduced to five years' imprisonment (R. 7A). Thereafter, petitioner, who was represented by appointed counsel, appealed in *forma pauperis* to the circuit court of appeals (R. 10, 12–13, 83).

The assignments of error (R. 12–13) and brief (p. 2) filed in petitioner's behalf on appeal raised only the questions whether petitioner was a "par-

ent" of the person kidnapped, who was his wife's illegitimate daughter by another man, and whether the daughter was a "minor," within the meaning of those terms as used in the excepting clause of the kidnapping statute.[1] The bill of exceptions filed by petitioner accordingly included a transcript of only such portions of the testimony as were considered pertinent to those issues (R. 14–78). The remainder of the testimony had been taken down in shorthand by the secretary to the trial judge, but had not been transcribed (R. 78, 105, 106, 108, 110).

On November 25, 1941, the circuit court of appeals affirmed the judgment of conviction; it held that petitioner was not a "parent" (R. 83–89; 123 F. (2d) 715). Thereafter, petitioner filed in the circuit court of appeals a "Petition for Rehearing and Writ of Certiorari" (R. 94–98). He contended in this that the evidence did not support the verdict and requested that the trial court be directed to have a full and complete transcript of the testimony prepared at the expense of the Government and forwarded to the circuit court of appeals in order that the question of the sufficiency of the evidence might be determined (R. 98). The cir-

[1] Petitioner's brief in the circuit court of appeals (pp. 2, 23) contained statements to the effect that petitioner would have assigned as error and contended that the verdict was against the weight of the evidence if he had been able to raise funds sufficient to pay the stenographer for transcribing all of the "voluminous testimony" so that it might be incorporated into his bill of exceptions.

cuit court of appeals thereupon rendered an opinion in which it said that petitioner's statement of the case, if true, indicated that he was wrongfully convicted and in which it adverted to the action of this Court upon consent of the Government in *Holmes* v. *United States*, decided December 8, 1941, No. 50, this Term, vacating the judgment of the circuit court of appeals in that case with instructions to afford an opportunity to the parties to agree upon a bill of exceptions. In order to ascertain whether the Government would consent to a reopening of the instant case, the court ordered the Attorney General and the United States Attorney to file responses to the "Petition for Rehearing and Writ of Certiorari" and to the court's opinion (R. 99–100; 124 F. (2d) 849).

The United States Attorney thereupon filed a response in behalf of the Attorney General and himself (R. 101–110). The response distinguished the situation in the *Holmes* case from that in the instant case (see *infra* p. 5) and opposed petitioner's applications on various grounds including that the Government could not legally pay for a transcript of the testimony. On March 25, 1942, the circuit court of appeals rendered an opinion denying the petition for rehearing and request for a transcript of the testimony on the ground that the court already had determined the only question which it had jurisdiction to decide upon the bill of exceptions filed by petitioner (R. 125–127).

ARGUMENT

Petitioner contends (Pet. 11) that the *forma pauperis* statute entitled him to a complete transcript of the testimony at the expense of the Government. This contention, however, was not made until after the bill of exceptions filed by petitioner had been settled (R. 79) and the appeal been decided. Accordingly, petitioner is in no better position to raise the question than was the petitioner in *Monsen* v. *United States*, No. 647, October Term, 1940, where similar circumstances were presented and certiorari was denied. 312 U. S. 701.[2] In any event, moreover, the contention is untenable on the merits.

The *forma pauperis* statute (*supra*, p. 2) permits impecunious persons to appeal without prepayment of fees or costs and provides that the court may direct that the expense of printing the record be paid by the United States upon authorization of the Attorney General. However, it contains no

[2] In *Evans* v. *United States*, No. 315, October Term, 1940, a capital case in which the defendant had made a timely application to secure the transcript at the expense of the Government, this Court granted certiorari, 311 U. S. 635. The cause later was remanded on stipulation of the parties (312 U. S. 651), the Government having ascertained that the trial judge's secretary who had taken the shorthand notes in that case was under contractual obligation as reporter to furnish the Government a transcript free of charge on request of the United States Attorney. Such circumstance was peculiar and we are advised that it has been changed and that the secretary of the trial judge in the instant case was and is under no similar obligation.

provision with respect to who shall stand the cost of furnishing the transcript of record. Accordingly, the court below and other courts have held without exception that the statute does not authorize the issuance of an order compelling the Government to furnish a transcript at its expense or at the expense of the trial judge's secretary or official reporter, whether or not employed by the Government. *United States* v. *Otis*, 18 F. (2d) 689 (C. C. A. 8); *Estabrook* v. *King*, 119 F. (2d) 607, 610 (C. C. A. 8); *United States* v. *Avis*, 108 F. (2d) 457 (C. C. A. 3); *United States* v. *Strewl*, 28 F. Supp. 87 (N. D. N. Y.); *United States* v. *Fair*, 235 Fed. 1015 (N. D. Cal.); *Cheek* v. *Thompson*, 33 F. Supp. 497 (W. D. La.). Rulings of the Comptroller General are in accord with these decisions. 9 Comp. Gen. 503; 21 Comp. Gen. 347. See also 19 Comp. Dec. 760; 20 Comp. Dec. 731; 5 Comp. Gen. 650.

Petitioner relies on *Holmes* v. *United States*, *supra*. But that case has no bearing herein. It involved no question as to whether the Government should furnish a transcript at its own expense. The question simply was whether the bill of exceptions filed by the defendant was adequate. The bill included a transcript of the testimony transcribed from the shorthand notes of defendant's stenographer, but the notes covered only a portion of all the testimony given at the trial. After the petition for writ of certiorari was filed, it developed

that a bill of exceptions satisfactory to both parties might possibly be settled. The Government accordingly consented to the action taken by this Court vacating the judgment of the circuit court of appeals and remanding the cause with instructions to afford the parties opportunity to agree upon a bill.

CONCLUSION

The case was correctly decided below and there is no conflict of decisions. The petition for a writ of certiorari therefore should be denied.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.
WENDELL BERGE,
Assistant Attorney General.
OSCAR A. PROVOST,
KEITH BROWN,
Attorneys.

MAY 1942.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 76

JESSIE WILLIAM MILLER, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the circuit court of appeals on the merits (R. 1–5) is reported at 123 F. (2d) 715. The initial opinion of that court on applications for rehearing and for appointment of counsel and an order directing that a verbatim transcript of the evidence be prepared at the Government's expense and filed in the circuit courts of appeals (R. 9–10) is reported at 124 F. (2d) 849. The opinion denying these applications (R. 30–32) is reported at 126 F. (2d) 462.

JURISDICTION

The judgment of the circuit court of appeals was entered November 25, 1941 (Tr. 90). The applications for rehearing and for appointment of counsel and an order directing that a transcript of the evidence be prepared at the Government's expense and filed in the circuit court of appeals, were denied March 25, 1942 (R. 30–32). The petition for a writ of certiorari was filed April 21, 1942, and granted June 8, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether a defendant in a criminal case who is appealing *in forma pauperis* is entitled to be furnished a verbatim stenographic transcript of the evidence at public expense,

2. Whether the judgment should be affirmed, or should be vacated and the cause remanded to give the petitioner an opportunity to prepare a new bill of exceptions by whatever means are available but without being furnished at public expense with a verbatim stenographic transcript of the evidence.

STATUTE INVOLVED

The Act of July 20, 1892, as amended [1] (commonly known as the *forma pauperis* statute), provides as follows:

[1] 27 Stat. 252, 36 Stat. 866, 42 Stat. 666 (28 U. S. C. 832, *et seq.*).

SEC. 1. Any citizen of the United States entitled to commence any suit or action, civil or criminal, in any court of the United States, may, upon the order of the court, commence and prosecute or defend to conclusion any suit or action, or an appeal to the circuit court of appeals, or to the Supreme Court in such suit or action, including all appellate proceedings, unless the trial court shall certify in writing that in the opinion of the court such appeal is not taken in good faith, without being required to prepay fees or costs or for the printing of the record in the appellate court or give security therefor, before or after bringing suit or action, or upon appealing, upon filing in said court a statement under oath in writing, that because of his poverty he is unable to pay the costs of said suit or action or appeal, or to give security for the same, and that he believes that he is entitled to the redress he seeks in such suit or action or appeal, and setting forth briefly the nature of his alleged cause of action, or appeal. In any criminal case the court may, upon the filing in said court of the affidavit hereinbefore mentioned, direct that the expense of printing the record on appeal be paid by the United States, and the same shall be paid when authorized by the Attorney General.

* * * * *

SEC. 5. Judgment may be rendered for costs at the conclusion of the suit as in other cases: *Provided,* That the United States

shall not be liable for any of the costs thus incurred.

STATEMENT

Petitioner and his wife were indicted in the District Court of the United States for the Western District of Arkansas for kidnapping in violation of the Act of June 22, 1931, as amended, 47 Stat. 326, 48 Stat. 781 (18 U. S. C. 408a). The indictment (R. 11–12), which was in one count, charged that by means of false representations the defendants inveigled Dorothie Crawford Garner to accompany them from DeQueen, Arkansas, to a point near McKinney, Texas, for the purpose of compelling Dorothie to work for them, and that by means of threats and violent beatings they held her in involuntary servitude from August 28, 1939, to February 29, 1940, when she escaped. The indictment further alleged that at the time of the kidnapping Dorothie, who was the illegitimate daughter of petitioner's wife by another man, was above the age of eighteen years and was married.

The defendants were represented by counsel appointed by the court and were tried before a jury. The evidence was reported in shorthand by the secretary to the district judge (R. 14, 18) but how the secretary came to report it does not appear.[1] The trial lasted seven days (R. 12, 18).

[1] In the Western District of Arkansas, in which this case arose, the secretary, a salaried employee of the United States, is "court reporter" (R. 14). The record does not show

The jury found the petitioner guilty of the crime charged (Tr. 6) but acquitted his wife. The petitioner was sentenced to seven years' imprisonment, later reduced to five years (Tr. 7, 7A; see R. 17).

The petitioner, still represented by one of the attorneys appointed by the district court, appealed *in forma pauperis* to the circuit court of appeals. The notice of appeal stated the contentions that the trial court erred in failing to direct a verdict for the petitioner and that the verdict was "contrary to the weight of the evidence" (R. 34). The bill of exceptions filed by the petitioner, however, did not include a full transcript or statement of the testimony but only those parts pertinent to the petitioner's contention that he did not violate the kidnapping statute because he was a "parent" of the kidnap victim, and she a "minor," within the meaning of the statutory exception of kidnapping "of a

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whether the judge requires him to make the notes for the judge's use or whether the secretary makes them on his own initiative in the hope that he will be paid to transcribe them by one of the parties in accordance with a practice existing in a few rural districts (see pp. 26–27, *infra*). The United States has no arrangement with him under which he is obliged to supply it with transcripts free of charge in cases in which the United States is interested, but he has on occasion done such work without charge when it did not interfere with his regular duties. Under the rulings of the Comptroller General, the Government may not compensate him for this work. See 19 Comp. Dec. 760. Neither may the Government require him to do such work since it is outside the scope of his official duties.

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minor, by a parent thereof."[3] Similarly, petitioner's assignments of error (R. 36–37) and brief in the circuit court of appeals raised only the questions posed by this defense. The circuit court of appeals ruled that the case was not within the exception and affirmed the conviction (R. 1–5).

Petitioner's brief in the circuit court of appeals stated that he would have assigned as error and contended that the verdict was against the weight of the evidence, if he had had funds sufficient to pay the stenographer for transcribing the testimony so that it might be incorporated into his bill of exceptions. But the petitioner did not, prior to the judgment affirming the conviction, ask the circuit court of appeals or the trial court or the Government either to furnish a full transcript or to assist in preparing a narrative statement for use on appeal.[4]

After the decision of the circuit court of appeals, however, the petitioner, appearing *pro se*,

[3] See 48 Stat. 781 (18 U. S. C. 408a).

[4] A letter from the trial judge's secretary to the Assistant United States Attorney states that shortly after petitioner was sentenced counsel inquired as to the approximate cost of a full transcript and was told by him that the cost would be from $500 to $600 for a record 700 to 800 pages long. Counsel then said that such an amount could not be paid, but later informed the secretary that petitioner's wife had provided $100 to be used in prosecuting an appeal and offered to pay him $50 for preparing the transcript which ultimately was filed. Copies of this letter and of other letters setting forth other relevant information have been made available to counsel for the petitioner and are printed in the Appendix, pp. 58–71, *infra*.

filed a "Petition for rehearing and writ of certiorari" (R. 5–8) in which he requested that the trial court be directed "to have prepared at Government expense, a full and complete record of all the testimony given in the case," and to forward it to the circuit court of appeals for consideration (R. 5). The petition alleged that "The evidence did not support the verdict" (R. 6) and included a "Statement of the Case" designed to show that the alleged victim of the kidnapping had requested the petitioner to take her to Texas and then had stayed there voluntarily (R. 6–8).

The circuit court of appeals entered an order directing the Government to respond to the application (R. 10). In an opinion filed concurrently the court explained that its purpose was to avoid a repetition of the proceedings in *Holmes* v. *United States,* 314 U. S. 583; in that case a judgment affirming a conviction because there was no bill of exceptions had been vacated by this Court upon consent of the Government when, on certiorari, it appeared that a bill of exceptions satisfactory to both parties could be settled (R. 9–10).[6]

The Government filed a detailed response in accordance with this order (R. 10–18). It alleged

[6] No question as to the obligation to supply a verbatim transcript was involved in *Holmes* v. *United States, supra.* The United States had objected to the defendant's proposed bill of exceptions as inaccurate and inadequate and it developed on certiorari that the inaccuracies and inadequacies probably could be remedied by mutual consent.

that the evidence did support the verdict. In regard to the possibility of procuring a transcript, it explained that the secretary to the trial judge had taken down all the proceedings in shorthand; that he had been ready to transcribe his notes upon payment of his customary charges but the petitioner had not ordered the transcription; that the Government could not lawfully pay the cost of procuring a transcript or require the trial judge's secretary to furnish one free of charge; and that, in any event, the secretary could not reasonably be asked to furnish a transcript at that late date because it would interfere with his official duties.*

To the foregoing response petitioner answered, saying that he had repeatedly requested his attorneys to raise the question of the sufficiency of the evidence but that they had refused on the ground that he had no money to procure a transcript (R. 25); also he alleged again that the evidence proved his innocence (R. 18–30).

* On July 10, 1942, after the writ of certiorari was issued herein, the United States Attorney communicated with the trial judge's secretary and was informed that both he and the trial judge would be "very reluctant" to furnish a transcript, but that he had donated his services in taking shorthand notes of the trial and would be willing to dictate them into a dictaphone so that the United States might have a transcript made from the dictaphone records. The secretary estimated that the typing of the transcript would cost from $500 to $600. The United States Attorney also stated that it would be "next to impossible" for the secretary to type the transcript and at the same time keep up with his regular work. See Appendix, pp. 58–59, *infra*.

The circuit court of appeals thereupon denied the application for an order directing the Government to supply the complete transcript (R. 32). The opinion filed contemporaneously with the order explained that the court had never had any intention of reopening the case to bring in questions not raised by the record unless the Government consented thereto (R. 30–32).

SUMMARY OF ARGUMENT

I

A verbatim stenographic transcript of the evidence is not a necessary part of a bill of exceptions. In legal theory the sole requirement is that the substance of the evidence showing the question of law shall be stated under the seal of the trial court. In practice such bills can readily be prepared from recollection or from notes made at the trial. Moreover, the law supplies ample aid to a defendant seeking to prepare such a bill, even to the extent of requiring the trial judge to use every available means to correct a *bona fide* draft tendered by a diligent defendant. Unquestionably, therefore, the petitioner is right in conceding that a verbatim transcript of the evidence is not necessary for him to question on appeal the sufficiency of the evidence to support his conviction. And, since he does not need a transcript for that purpose, the Court would not order the Government to furnish one even if it had power to do so.

In the federal courts there is no official report of the proceedings and a stenographic transcript

has never been available except to persons able to compensate a private reporter. This practice, as well as many decisions, attests to the rule that the Government is under no obligation to supply a verbatim transcript of the evidence to a pauper. We agree that a modern reporting system should be established in the federal courts but we submit that for the courts to make so radical a change from the existing rule would usurp the functions of the legislature. Three other reasons also show that the courts should not impose the duty on the Government. First, it is settled that the power to employ a stenographer rests upon the power to tax costs, and costs cannot be taxed against the Government. Second, the Constitution forbids expenditure of monies in the absence of an appropriation by Congress. In view of the large expenditures which supplying reporters and transcripts to poor defendants would entail, the failure of Congress to make an appropriation for that purpose shows that no such expenditures were intended. Third, the fact that Congress has expressly specified some services to be supplied free to paupers is a strong indication it has assumed no other obligation.

The existing *forma pauperis* legislation neither expressly nor impliedly confers upon indigent defendants the right to a verbatim transcript of the evidence. The petitioner's argument is that such an intention is to be implied because the right to appeal is dependent upon the availability of such

a transcript. But the argument is unsound; there are other adequate means of preparing bills of exceptions.

The Fifth Amendment does not require that the petitioner be furnished a verbatim transcript. The right to appeal is statutory and, so long as all may exercise that right by one means or another, it is not arbitrary or capricious for the Government to allow those who have the means to use stenographic transcripts without supplying such transcripts to paupers.

II

Although there has been a consistent failure to assert petitioner's rights at the proper time, we agree that the cause should be remanded to give him the opportunity to prepare a bill of exceptions by any available means but without being furnished the verbatim transcript at the expense of the public or the judge's secretary. The petitioner personally has sought to assert his rights at all times and the neglect or errors in procedure were made by counsel appointed by the court.

ARGUMENT

I

PETITIONER IS NOT ENTITLED TO BE FURNISHED A VERBATIM TRANSCRIPT OF THE EVIDENCE AT PUBLIC EXPENSE

Introductory.—The petitioner seeks to procure a verbatim stenographic transcript of all the evi-

dence at his trial in order that he may raise on appeal from the judgment of conviction the question whether the evidence was sufficient to support the jury's verdict. The Government agrees with the petitioner that he was entitled to raise that question and, to that end, to present to the trial judge and have allowed a bill of exceptions showing what was the evidence against him. The controversy concerns whether he has followed a correct course for preparing such a bill.

The easiest way to prepare a bill of exceptions is to arrange for a verbatim stenographic transcript. In the instant case the testimony was reported in shorthand by the secretary to the trial judge—whether or not at the request of the judge does not appear[1]—and the secretary, in a private capacity, was willing to transcribe his notes upon being paid fair compensation for his services (see p. 8, *supra*). But this course was closed to the petitioner because he lacked the necessary money.

A second course, which the petitioner might have followed, was to prepare a bill of exceptions from memory, aided by notes kept by one of his attorneys at the trial, and by the recollection of witnesses or bystanders. If the petitioner had prepared a bill of exceptions in this way and had

[1] The secretary billed the petitioner's attorney at a *per diem* rate for attending the trial. See Appendix, p. 67, *infra*. It is at least a possibility therefore that the secretary made the notes in a private capacity and not as secretary to the judge.

tendered it to the trial judge, it would have been the judge's duty to give the petitioner affirmative assistance in making the bill accurate and to use, so far as necessary, every means available for that purpose, including his own notes or any notes made for him by his secretary. It is the Government's position that the petitioner should have followed this course. It is conceded by the petitioner that by this procedure a bill of exceptions could have been easily settled in the instant case (Br. 17).

The third course conceivably open to the petitioner was to obtain an order directing the Government to pay the cost of the verbatim transcript. The judge's secretary was willing to make dictaphone records from his notes, although the pressure of his regular work made it impossible to do more; and from the dictaphone records a typewritten transcript could be prepared at a cost of between $500 and $600.* See p. 8, *supra*. The petitioner made no attempt to secure such an order prior to the decision of the circuit court of appeals but on a petition for rehearing he belatedly sought to follow that course. The same contention is renewed here, both directly by the

*The Government is prohibited by statute from paying compensation to the judge's secretary for transcribing the notes even though it is clear that the Government cannot require him to make the transcription as part of his duties. 19 Comp. Dec. 760. In the instant case, however, this problem is avoided by the willingness of the secretary to make dictaphone records free, for another person might be employed to do the typing.

argument that the Government should be ordered to pay the cost of typing a transcript, and indirectly by the suggestion that the secretary should be required by the judge to take time off from his other duties to prepare a complete verbatim transcript for the petitioner. It is the Government's position that this course has never been open to the petitioner, and that neither he nor any defendant in a criminal case is entitled to have a complete verbatim stenographic transcript of the evidence at public expense.*

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* In our memorandum in opposition to the petition for certiorari we suggested that the petition should be denied on the ground that the petitioner's attempt to procure a transcript came too late. He raised no question of the sufficiency of the evidence to support his conviction and made no application for an order directing the Government to supply him with a transcript until after the decision of the circuit court of appeals. That court denied the petition for rehearing without passing upon the merits of the petitioner's new contention on the ground that it had decided the only question presented on the appeal. This was in accordance with its Rule 18 which provides that "the sole purpose of a petition for rehearing is to call attention to matters of law or fact inadvertently overlooked by the court as shown by its opinion." Moreover, its action was also in accordance with the general rule that an appellate court will not consider questions raised for the first time on a petition for rehearing. *Independent Wireless Telegraph Co.* v. *Radio Corporation of America*, 270 U. S. 84. It seemed, therefore, that it could scarcely be said that the court below had abused its discretion in failing to entertain the application on its merits, and that for that reason the petition for certiorari should be denied. Indeed, in *Monsen* v. *United States*, No. 647, October Term, 1940, this Court denied certiorari, 312 U. S. 701, although the Government conceded that the writ should

The chief issue in the instant case, therefore, is whether the petitioner was bound to follow the second course exclusively or whether the third course was also open to him.[10] In support of our position we shall show (A) that a verbatim transcript, although convenient, is not essential to settlement of an adequate bill of exceptions either in legal theory or in the practicalities of preparing the bill; (B) that in the absence of an ex-

issue unless the petitioner by failing to raise the question of his right to a verbatim transcript before the decision on appeal had lost his standing to raise it. See also *Sanders and Keefe* v. *United States*, No. 151, present Term, certiorari denied October 12, 1942. On further consideration it seems that this case is peculiar in that the petitioner did not acquiesce in his attorneys' failure to question the sufficiency of the evidence and repeatedly urged them to raise the question. We discuss the significance of this fact in Point II, pp. 54–57, *infra*.

[10] This issue has never been argued before the Court on the merits but it has been raised in several petitions for certiorari. In *Evans* v. *United States*, No. 315, October Term, 1940, certiorari was granted, 311 U. S. 635. The case was remanded upon stipulation (312 U. S. 651) when the Government ascertained that a stenographer had taken shorthand notes which it could cause her to transcribe without additional cost. The case was wholly unlike the instant case because the stenographer was paid a salary to act as secretary to the district judge and to furnish verbatim transcripts of evidence without charge whenever the Government should require; in the instant case no such arrangement exists. In *Monsen* v. *United States*, No. 647, October Term 1940, and *Sanders and Keefe* v. *United States*, No. 151, present Term, the petitioners sought to raise the issue but certiorari was denied. See p. 14, n. 9, *supra*. *Holmes* v. *United States*, 314 U. S. 583, did not involve this issue. See p. 7, n. 5, *supra*.

press statute the Government is under no obligation to, and indeed cannot lawfully procure and furnish transcripts at public expense; (C) that no statute grants a defendant proceeding *in forma pauperis* the right to be supplied with a transcript at public expense; and (D) that the Fifth Amendment does not require as a prerequisite to a lawful conviction that a poor defendant be supplied with a transcript in order that he may have a convenience to his defense obtainable by others.

A. A VERBATIM TRANSCRIPT OF THE EVIDENCE IS NOT ESSENTIAL TO SETTLEMENT OF A BILL OF EXCEPTIONS ADEQUATE FOR THE COMPLETE EXERCISE OF THE RIGHT OF APPEAL IN CRIMINAL CASES

The right to appeal in criminal cases is statutory. *District of Columbia* v. *Clawans*, 300 U. S. 617, 627; *United States* v. *Sanges*, 144 U. S. 310, 319, and cases cited. It is a mistake therefore to speak, as the petitioner does throughout his brief, of some inherent power in a trial court in a criminal case to facilitate the defendant's appeal. The question is what procedure did Congress establish and what rights did Congress confer upon the defendant. But since neither the procedure nor the defendant's rights are described in detail by statute, it is held that Congress intended to make applicable to criminal cases the procedure of preserving questions for review by

bill of exceptions, which originated in the statute of Westminster II, 13 Edw. I, ch. 31, and which in civil actions is part of our common law."[11] *Buessel* v. *United States*, 258 Fed. 811, 816–820 (C. C. A. 2); *Maresca* v. *United States*, 277 Fed. 727, 733 (C. C. A. 2).

A verbatim transcript of the evidence is not a necessary part of a bill of exceptions. The function of such a bill is to show the challenged ruling, together with so much of what occurred at the trial as will make plain the question of law. Where the alleged error rests upon a negative showing that there was no evidence to support the trial court's ruling, the bill must show that it contains all the evidence material to the point. Where, as in the present case, the question of law is whether there was any evidence to support the jury's verdict, it must appear that the bill contains all the relevant evidence adduced before the trial court. But this rule does not require that all the testimony shall be set forth at length in the words of the witnesses, or that the exhibits must all be included. It is enough that the bill of exceptions show the substance of the evidence. *Krauss Bros. Co.* v. *Mellon*, 276 U. S. 386, 389–

[11] To some extent, of course, the ancient practice has been modified. For example, it is no longer required that a separate bill be sealed for each ruling to be challenged on appeal (*Lees* v. *United States*, 150 U. S. 476), nor is it necessary to seal the bill when the exception is taken (*Dredge* v. *Forsyth*, 2 Black 562, 568).

391. Indeed, in criminal cases it formerly was a violation of the criminal rules to set out in the bill of exceptions a verbatim transcript of the evidence; the testimony and exhibits were required to be summarized and the irrelevant parts omitted, even when the sufficiency of the evidence was challenged. *Rosen* v. *United States*, 271 Fed. 651 (C. C. A. 2); *Marr* v. *United States*, 8 F. (2d) 231 (C. C. A. 8), certiorari denied, 270 U. S. 644; *Hursh* v. *Killits*, 58 F. (2d) 903 (C. C. A. 9); *Metzler* v. *United States*, 64 F. (2d) 203, 209–210 (C. C. A. 9).

Just as the form in which the pertinent evidence is set forth is immaterial, so it is immaterial from what source the court and parties obtain the facts which the bill of exceptions must contain. It is ordinarily the duty of the appealing party to prepare the bill and submit it to the judge. *Chateaugay Iron Co., Petitioner*, 128 U. S. 544, 547. He may rely on his or his attorney's notes taken at the trial; he may obtain the recollection of bystanders or have the witnesses repeat to him their testimony; or he may rely on notes taken by a stenographer.[12] When the bill is presented to the judge, he may test its accuracy against his recollection or his notes, or he may verify it by calling

[12] See *Benson* v. *Christian*, 129 Ind. 535; *McCoy* v. *Able*, 131 Ind. 417, 419; *State* v. *Weygandt*, 35 Ohio App. 433, 435; and cases cited pp. 19–22, *infra*.

witnesses to state what occurred at the trial."[13] The critical fact is the approval of the judge, witnessed by his seal or signature. "Minutes of the judge or clerk, or notes of a stenographer, cannot take the place of a bill of exceptions, but are only memoranda by the aid of which one may afterwards be drawn up." *Hanna* v. *Maas*, 122 U. S. 24, 26. Even a complete stenographic transcript is insufficient if no bill has been signed. *Cavagnaro* v. *Latimer*, 50 F. (2d) 898 (C. C. A. 3); *Knight* v. *Illinois Cent. R. Co.*, 180 Fed. 368 (C. C. A. 6). Conversely, the judge may not refuse to sign a bill of exceptions on the ground that a stenographic transcript is not available. *Middleton* v. *Hartford Acc. & Indemnity Co.*, 119 F. (2d) 721 (C. C. A. 5); *Coulston* v. *United States*, 51 F. (2d) 178 (C. C. A. 10), *semble*; *Hall* v. *Gordon*, 119 F. (2d) 463 (App. D. C.); *Weatherford* v. *Wilson*, 3 Ill. 253; *Weber* v. *Sneeringer*, 247 Ill. App. 294, 299; *State* v. *Garvin*, 87 Ind. App. 426; *Benson* v. *Christian*, 129 Ind. 535; *McCoy* v. *Able*, 131 Ind. 417, 419; *Planters' Oil Mill* v. *Yazoo & M. V. R. Co.*, 150

[13] *Collier* v. *State*, 13 Ark. 676, 679; *Pearson* v. *Grice*, 8 Fla. 214, 223; *Weatherford* v. *Wilson*, 3 Ill. 253; *People* v. *Gary*, 105 Ill. 264; *People* v. *Chetlain*, 219 Ill. 248, 263; *Tindall* v. *Chicago & Northwestern Ry. Co.*, 200 Ill. App. 556, 561–562; *Mayville* v. *French*, 246 Ill. 434, 438; *Whitmore & Pegram* v. *Coats*, 14 Mo. 9; *State* v. *Cooper*, 107 Tenn. 202, 210–211.

Miss. 813; *State* v. *Wear*, 101 Mo. 414, 417; *State* v. *Weygandt*, 35 Ohio App. 433, 435; cf. *St. Louis Southwestern Ry. Co.* v. *Purcell*, 135 Fed. 499 (C. C. A. 5). But see *State* v. *Craig*, 15 Wyo. 439, 446.

In practice, too, a stenographic transcript of the testimony is not a necessity. Through familiarity it has become a habit to look upon the convenience of a verbatim transcript of the evidence as an absolute necessity to the preparation of a bill of exceptions, and to forget that adequate bills of exceptions were prepared long before modern shorthand and practicable typewriters were developed.[14] It would seem today that preservation of a verbatim record of all the proceedings should be made an integral part of the official court procedure. See pp. 29–30, *infra*. But the desirability of such a system should not obscure the fact that these other devices for appealing questions even of the sufficiency of the evidence are available. Nothing more is required than diligence on the part of the accused and his attorneys in preparing their case and in keeping notes of the evidence for the prosecution. "A stenographic report, while helpful, is not indispensable in the settlement of a bill of exceptions."

[14] Marcus Tullius Tiro took down in shorthand the orations of Cicero but the first modern shorthand system was developed about 1835. XX Encyclopedia Britannica, p. 576. The first United States Letters Patent for a typewriter were issued in 1829 but the first practicable typewriter was not developed until 1867. XXII, *Id.*, pp. 644–645.

Coulston v. *United States*, 51 F. (2d) 178, 180 (C. C. A. 10). See *Dobbs* v. *State*, 5 Okla Cr. 475, 479, 485.[15]

Moreover, the law supplies ample aid to the party who is seeking to have a bill of exceptions settled and sealed without the aid of a transcript. If the opposing party objects to the proposed bill, he must show wherein it is deficient, thus giving the appellant an opportunity to correct inaccuracies and supply omissions. It is the duty of the trial judge to make the bill accurate and, when it is presented to him, to give affirmative assistance. *Dibble* v. *Truluck*, 11 Fla. 135; *State* v. *Cooper*, 107 Tenn. 202, 210–211; *State* v. *Weygandt*, 35 Ohio App. 433, 435; *Beebe* v. *State*, 106 Ohio St. 75, 80; *Poteet* v. *County Commissioners*, 30 W. Va. 58, 89; *Sansome* v. *Myers*, 80 Cal. 483; *Kouts* v.

[15] For these reasons it was said in *Jeffries* v. *State*, 9 Okla. Cr. 573, that a defendant who has employed counsel has no need of a stenographic transcript and no right to be supplied with one at public expense. But the court also held that counsel appointed to represent a defendant had no duty to prepare a bill of exceptions by notes and recollection and that the court reporter who was paid a salary by the state to report trials should in such a case supply the transcript free of charge. We submit that this distinction is untenable and that every attorney, whether retained by a party or appointed by the court, has a duty to take every step against a possible appeal, including making notes for preparing a bill of exceptions. The *Jeffries* case in any event is not authority for the petitioner's position because the only issue was whether the defendant had means of presenting his appeal without the stenographic transcript. If he did not, he was entitled to a transcript at public expense under the express provisions of Oklahoma Revised Laws (1910) §§ 1785–1788.

Superior Court, 135 Cal. App. 699; *Weatherford* v. *Wilson*, 3 Ill. 253. In *Poteet* v. *County Commissioners*, *supra*, the court said (p. 89):

> But the duty of the judge is not ended and fully discharged, when he merely refuses to sign a particular bill tendered, on the ground that the truth of the case is not fairly stated therein. He should go further. He should proceed with the aid of counsel to settle the bill and when settled to sign it. * * *

The judge will have his notes available and may call any necessary witnesses who can testify concerning the course of the trial. (See cases cited, p. 19, n. 13, *supra*.) Moreover, if the judge required his secretary to be in court and take notes, the judge certainly would call on his secretary so that notes could be used so far as necessary to settle the bill, even though no one paid for a complete transcript. Cf. *Middleton* v. *Hartford Acc. & Indemnity Co.*, 119 F. (2d) 721, 724 (C. C. A. 5). And, if the judge refuses to perform these duties, the remedy of mandamus is available. Cf. *Ex parte Bradstreet*, 4 Pet. 102; *Chateaugay Iron Co., Petitioner*, 128 U. S. 544, 557. This duty resting upon the judge is implicit in Rule VII of the Criminal Appeals Rules:

> The clerk of the trial court shall immediately notify the trial judge of the filing of the notice of appeal, and thereupon the trial judge shall at once direct the appellant or his attorney, and the United States

> Attorney, to appear before him and shall give such directions as may be appropriate with respect to the record on appeal, including directions for the purpose of making promptly available all necessary transcripts of testimony and proceedings. * * *

Like every unsuccessful party, the petitioner had the opportunity to secure a bill of exceptions in the manner which we have described. Indeed, his counsel now concedes in his brief that an adequate bill of exceptions could have been prepared without first securing a complete verbatim transcript (Br. 15, 17). The record does not show why the petitioner and the attorneys then representing him did not follow that course but there is not the slightest basis for the suggestion in the petitioner's brief (Br. 17) that the trial judge did not hold the required conference and was in some way derelict in his duty. It seems that when it became apparent that a bill of exceptions containing all the evidence could not be prepared by the convenient method of purchasing a complete verbatim transcript, the petitioner and his attorneys simply did not go to the trouble of seeking to settle the bill by the other means available.

It may be argued that since an affirmative duty rests on the trial judge to aid in preparing the bill of exceptions (see pp. 21-22, *supra*) he is also obliged to make available by transcription the shorthand notes taken by his secretary. But

any such contention would be unfounded. The primary obligation rests upon the party; he may not shift it to the judge. *Michigan Insurance Bank* v. *Eldred,* 143 U. S. 293, 298. The duty of the judge, in other words, is to make complete and accurate the bill of exceptions tendered by the party, and not to prepare the bill. This limitation is recognized in the cases emphasizing the duty of the judge to render affirmative aid (see pp. 21–22, *supra*); for example, it was stated in *Sansome* v. *Myers,* 80 Cal. 483, 486, as follows:

> We must not be understood as intending to justify the too prevalent habit on the part of some attorneys of presenting an imperfect statement, thereby casting upon opposing counsel and the court the labor of piecing out and making complete a statement that should have been made perfect by the appealing party in the first instance. Such a course, whether it results from a design to gain an undue advantage, or from indolenee, should be severely condemned, and the party practicing it should be required by the judge to make and present a proper statement.

See, also, *Black* v. *Youmans,* 245 Fed. 460 (C. C. A. 8); *Walker* v. *United States,* 113 F. (2d) 314 (C. C. A. 9).

The distinction is a substantial one. The verbatim record of any trial includes many pages that are irrelevant on appeal and more that may

be summarized in a few words. Even where the sufficiency of the evidence is questioned there may be summarized or omitted such matters as cross-examination to test the credibility of witnesses, evidence of reputation, testimony on subsidiary issues the sufficiency of which is not in dispute, and much of the evidence for the defendant. By making the defendant and his counsel do this in the first instance much the greater part of the work of typing a verbatim transcript is avoided. To allow the party to make the secretary to the judge perform that unnecessary work, would be to place an unreasonable burden on the judge. It will scarcely be suggested that a party without attempting to keep notes and prepare a draft bill of exceptions may compel the judge to prepare the bill from his minutes. By a parity of reasoning the petitioner may not compel the judge to prepare the bill from minutes kept for him by his secretary or to donate the services of his secretary in spite of his need for those services in his regular work. (See Appendix, pp. 58–59, *infra*).

The fact that a verbatim transcript is not necessary to a sufficient bill of exceptions, either in legal theory or in practice, is reflected in the outmoded system of reporting which now exists in the federal courts. In spite of the development of shorthand and mechanical reporting, Congress has never established a system of official reporting as part of the administration of justice. As a result, reporting practices have grown up haphazardly

under the direction of the litigants with only occasional supervision by local court rules. In all the judicial districts the reporters are compensated by the parties, and no case is reported unless the parties request it or the court so orders. In most districts the practice is for the parties to arrange for a reporter and for the amount of the reporter's compensation. In others, the rules provide for designation of an official reporter and fix the fees which may be charged for reporting the case and for supplying any transcripts requested by the parties. In a few rural districts, as in the instant case, the "official" reporter is the secretary to the district judge, and supplements his salary by the fees which he charges any litigant who asks him to transcribe his shorthand notes for the transcript on appeal.[10]

The result of this system of reporting is that, as a rule, criminal trials are reported only if the defendant orders the report and pays the fees

[10] In a letter to the Attorney General dated February 23, 1926, the Comptroller General ruled that this practice was a violation of the Act of March 3, 1917, 39 Stat. 1106, because the fees are received "in connection with" the secretary's official duties. 5 Comp. Dec. 650.

For a more detailed description of the present reporting system than is given in this brief, see Report of the Director of the Administrative Office of the United States Courts to the Judicial Conference of Senior Circuit Judges on Compensation of Court Reporters in the Federal Courts, dated September 23, 1940, and a memorandum entitled "Memorandum Regarding Rule 82 (a)," dated August 26, 1937, prepared by Leland L. Tolman for the Advisory Committee, which is appended to the Director's report.

charged by a private reporter.[17] Likewise, even if the case happens to be reported, the notes are transcribed only if the defendant orders and pays for the transcription. The exceptions to this rule are the cases in which the Government orders a transcript and arranges to pay the contracting reporter out of appropriations made by Congress for that purpose; but since the Government has no right of appeal it is warranted in arranging for a reporter or for a transcript only in rare cases.[18] Moreover, the consistent practice has been, and the Comptroller General and inferior courts have ruled,[19] that the Government may not expend money to purchase a transcript for the defendant's use even though the evidence has already been reported in shorthand. There is no district, except possible the Southern District of New York,[20] in which the

[17] Even in the districts in which a so-called "Official Reporter" is appointed, he is not a court officer. *Loc. cit. supra* n. 16.

[18] Under date of July 18, 1933, the Attorney General instructed all United States Attorneys that "In the interest of economy and for the further reason that the Government does not have the right of appeal, the Department has decided to discontinue the practice of employing court reporters in criminal cases, except that cases of *outstanding importance* may be reported, provided the district attorney certifies that fact to the Department and secures its approval before incurring the expense." Department of Justice Circular No. 2426.

[19] See pp. 52–53, *infra*.

[20] By General Rule 33, adopted January 22, 1941, the District Court for the Southern District of New York appointed the Southern District Court Reporters, a partnership, as

Government has made arrangements permitting it to order a transcript without a charge being made. In short, under the existing system, as generally applied and understood, the only defendants in criminal cases who are able to obtain verbatim transcripts for use on appeal are those who are able to employ a private reporter.

B. IN THE ABSENCE OF AN EXPRESS STATUTE A PAUPER DEFENDANT IS NOT ENTITLED TO A VERBATIM TRANSCRIPT OF THE EVIDENCE AT PUBLIC EXPENSE

The foregoing summary of the nature of and means for preparing a bill of exceptions, and of the existing reporting system, demonstrates, we submit, that under the common law a stenographic transcript has never been essential in theory or practice to the exercise of the right of appeal.

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official court stenographer. The rule provides that the partnership shall furnish a stenographer to attend at all civil trials and proceedings where a record is to be made and fixes the compensation which the partnership shall be entitled to receive for attendance of a stenographer and for transcripts. No charges are allowed to be made to the Attorney General or the United States Attorney. In respect of criminal cases the rule provides:

"Where a record is required to be made, it shall provide a competent court stenographer to attend and report all criminal trials and proceedings had before the Judges sitting in this court or before the United States Commissioner for the Southern District of New York, but not otherwise.

"Said stenographers must furnish, without cost, to the United States Attorney for the Southern District of New York, or his assistants, as and when required, full and accurate transcripts of all criminal trials and proceedings so reported."

When Congress extended to defendants in criminal cases the right to appellate review, it must have intended to provide, except as it expressly stated otherwise, the same method of review upon a bill of exceptions as existed in civil actions at law. Cf. *Maresca* v. *United States*, 277 Fed. 727, 733 (C. C. A. 2); *Buessel* v. *United States*, 258 Fed. 811, 816–820 (C. C. A. 2). Specifically, it cannot be supposed in the absence of an express provision that Congress intended to change the practice and require the Government to supply pauper defendants with verbatim transcripts of the evidence. The existing practice attests the understanding of the courts and the bar that no such requirement exists. And the lower courts have so decided in numerous cases. *Moder* v. *United States*, 62 F. (2d) 462, 464–465 (App. D. C.); *Coulston* v. *United States*, 51 F. (2d) 178 (C. C. A. 10); *United States* v. *Fair*, 235 Fed. 1015 (N. D. Cal.); *United States ex rel. Estabrook* v. *Otis*, 18 F. (2d) 689, 690 (C. C. A. 8); *United States* v. *Strewl*, 28 F. Supp. 87, 88 (N. D. N. Y.); *United States ex rel. McNeill* v. *Avis*, 108 F. (2d) 457 (C. C. A. 3); *Estabrook* v. *King*, 119 F. (2d) 607, 610 (C. C. A. 8); *Check* v. *Thompson*, 33 F. Supp. 497, 499 (W. D. La.).

We are not concerned in the present case, we submit, with the faults of the existing system. We agree that a system should be established under which the evidence at every criminal trial

would be reported in shorthand or by mechanical means and transcripts supplied at public expense to defendants who are entitled to appeal *in forma pauperis*. A bill which would, among other improvements, accomplish that purpose has been recommended by the Judicial Conference of Senior Circuit Judges and has been introduced in the present Congress.[21] We submit, however, that for the courts to make so radical a change upon their own initiative would be to exceed the judicial function and assume the role of Congress.

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[21] The bill (H. R. 6494) is in the form of a new section (Section 5a) amending the Judicial Code and is designed to establish an official court reporting system for the federal district courts. It was drafted by a committee of the Judicial Conference of Senior Circuit Judges headed by Judge Parker, with the collaboration of the Department of Justice and the Administrative Office of the United States Courts. Section 5a (c) provides:

"*Duties.*—Some one of the official court reporters so appointed for each district court *shall attend at each session of the court and at each such other proceeding as may be designated by rule of procedure or order of court or by one of the judges of the court*, and shall record verbatim by shorthand or by mechanical means such of the proceedings as a judge of the court may direct or as may be required by rule of procedure or order of the court or as may be requested by any party to the proceedings. *All proceedings in criminal cases had in open court, whether in connection with plea, trial, or sentence, shall be thus recorded; in all other cases all proceedings had in open court shall be thus recorded unless the parties shall specifically agree to the contrary.* The original shorthand notes or other original records so taken shall be preserved in the records of the court for not less than five years. Upon the request of any party to any proceeding which has been so reported or of the judge of the

Three other reasons point to the same conclusion. Since Congress has made no provision of public funds for stenographic reporting, the power to order a transcript of the evidence to be made is ordinarily dependent upon a power to tax the expense as costs. *Ex parte Peterson,* 253 U. S. 300. But that basis for an order is lacking here, for the United States by becoming a party does not subject

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court, the official court reporter shall promptly transcribe his original records of the requested parts of the proceedings and attach thereto his official certificate, and shall then deliver the transcript to the party or judge making the request. He shall also transcribe and certify such other parts of the record of proceedings as may be required by rule of procedure or order of court. No transcripts of the proceedings of the court shall be considered as official except those made from the records taken by the official court reporter."

Section 5a (e) provides:

"*Fees.*—In addition to the amounts to which he may be entitled under subdivision (d) of this section, the official court reporter may charge and collect from parties, including the United States, who request transcripts such fees therefor, and no other, as may be established from time to time by the court subject to the approval of the judicial conference, except that when the reporting is provided for by contract, the fees collected for transcripts shall be those provided for in the contract. *The fees for transcripts furnished to a judge for his personal use and the fees for transcripts furnished in criminal or habeas corpus proceedings to persons allowed to sue, defend, or appeal in forma pauperis shall be paid by the United States out of money appropriated for that purpose.* Except as otherwise provided in the Act of July 20, 1892 (ch. 209, 27 Stat. 252, as amended, U. S. C., title 28, secs. 832–836), and other laws relating to the prosecution of actions without prepayment of fees and costs; the official court reporter may require any party requesting a transcript, except the United States or its officers or agencies,

itself to liability for costs. *United States* v. *Chemical Foundation, Inc.*, 272 U. S. 1, 20–21.

Second, the magnitude of the alleged obligation which the petitioner contends rests upon the Government, and the failure of Congress expressly to authorize the Executive Department to perform the obligation, is the strongest proof that Congress does not intend such an obligation to exist. If an obligation rests upon the Government to purchase a transcript in a case in which by some chance shorthand notes have already been taken, then the Government must equally be obliged to supply a reporter at all criminal trials after which a pauper may wish to challenge the sufficiency of the evidence on appeal; no valid distinction can be based upon the adventitious circumstance that shorthand notes are already in existence. Manifestly, performance of an obligation to supply reporters at all criminal prosecutions against paupers and a verbatim transcript whenever a pauper wished to appeal, would result in large public expenditures. Under these circumstances, the failure of Congress

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to prepay the estimated fee therefor in advance of delivery of the transcript. He shall record and transcribe the proceedings in cases, civil or criminal, where one or more of the parties is allowed to prosecute or defend the action or to appeal without prepayment of fees, as he would in other cases; but no fees either for attendance and reporting or for furnishing a transcript of the testimony in such proceedings shall be required to be advanced him for such services or transcript by a party allowed to sue, defend or appeal without prepayment of fees." [Italics supplied.]

to make expressly the large appropriations which would be required reveals that Congress does not intend the Executive Department to supply them.[22] For the Constitution forbids the Executive Department to expend funds in the Treasury without statutory authorization.[23]

Third, the inference to be drawn from the failure of Congress to make provision for reporters and transcripts is rendered inescapable by the fact that Congress expressly dealt with the rights of pauper litigants in the Act of July 20, 1892, as amended, commonly known as the *forma pauperis* statute. If Congress intended pauper defendants to be supplied with transcripts of the testimony, it would have made the provision in that statute. We submit, therefore, that it is clear that the Government should not be ordered to supply the petitioner with a verbatim transcript at public expense unless the *forma pauperis* statute empowers the Government to expend money for that purpose. We shall show

[22] The item in the Appropriation Bill for stenographic reporting services, referred to by the petitioner (Br. 52), manifestly was not intended to authorize supplying transcripts to paupers in criminal cases. The Director of the Administrative Office of the United States Courts explained that the item was very small and covered such matters as disbarment proceedings. See Hearings before the House Committee on Appropriations on the Department of Justice Appropriation Bill for 1942, pp. 706–707.

[23] U. S. Const., Art. I, sec. 9; *Ring* v. *Maxwell*, 17 How. 146, 147; *Reeside* v. *Walker*, 11 How. 271, 290; *Cincinnati Soap Co.* v. *United States*, 301 U. S. 308, 321.

presently that the *forma pauperis* statute does not grant that authority.

The petitioner pitches his case upon the argument that a trial court, as distinguished from an appellate court, has an "inherent power" to make an appeal effective. He argues (1) that in *United States* v. *Gildersleeve*, 193 U. S. 528, the Court recognized the "inherent power" of a trial court to supply paupers verbatim transcripts at public expense; and (2) that the question "is whether any barrier to such assistance has been erected since that time." But the argument rests upon an unsound premise. Criminal appeals are wholly a matter of statute; the courts have no inherent powers in that regard and appellants have no rights not granted by Congress. And for the reasons stated above, it is clear that Congress did not grant the right to be supplied with a complete verbatim transcript of the evidence at public expense.

The petitioner's reference to the "inherent power" of a court is unpersuasive for a second reason. We may assume *arguendo* that the doctrine on which he relies prevails in the federal courts. It is irrelevant here because the principle sustains only the power of the court to proceed, and to require its officers to proceed, without receipt of the customary charges. In *King* v. *Wright*, T. Hard. 253, 95 Eng. Rep. 162, the power was sustained because "it is only in effect ordering their own officers not to take fees" (95

Eng. Rep. at 163). And in *Martin* v. *Superior Court*, 176 Cal. 289, another case relied upon by the petitioner, the power of the court was said to be to require "every officer * * * to perform his duty without the payment of fees as fully as though the legal fees had been paid" (176 Cal. at 297–298). The secretary who took the notes in this case was not an officer of the court, and, as we have pointed out, in the federal courts there is no official court reporter in criminal cases. See also *United States* v. *Fair*, 235 Fed. 1015 (N. D. Cal.); *Coulston* v. *United States*, 51 F. (2d) 178, 180 (C. C. A. 10); *Moder* v. *United States*, 62 F. (2d) 462, 464–465; cf. *Estabrook* v. *King*, 119 F. (2d) 607, 609. And certainly the principle that a court will act and compel its officers to act without payment of fees or costs cannot be extended to authorize the court to order the Government to expend funds to supply reporters and transcripts notwithstanding the constitutional inhibition and the want of an appropriation by Congress.

The petitioner's statement (Br. 26) that a number of courts have held that "*without statutory authority*"[24] therefor, a court can require that an indigent defendant in a criminal case be furnished with a transcript * * * at public expense," is entirely misleading. The first case cited is *State* v. *Klein*, 95 Conn. 451. At the time it was decided, Connecticut General Laws (1918),

[24] Italics added.

section 2229, made provision for official stenographers who received a per diem salary, and expressly provided that the fee for a transcript "made for the court" should be paid "as other court expenses." Likewise, when *Jeffries* v. *State*, 9 Okla. Cr. 573, was decided, Oklahoma Revised Laws (1910), sections 1785–1788, made provision for official stenographers who received a salary, and expressly required them to furnish transcripts to paupers free of charge when necessary to an appeal; the question in the *Jeffries* case was whether a transcript was necessary (see also p. 21, n. 15, *supra*). The third case relied on by petitioner is *State ex rel. Coella* v. *Fenimore*, 2 Wash. 370, which was overruled as applied to a stenographer's transcript in *State ex rel. Mahoney v. Ronald*, 117 Wash. 641. The fourth, *Ex parte Morgan*, 122 Ind. 428, contains only a dictum that "a case might arise where it might be an abuse of discretion to refuse" an allowance for a stenographic transcript (p. 432); moreover, at that time Indiana Revised Statutes (1881), section 1405, expressly provided for salaried court reporters, and section 260 required court officers in a pauper's case to "do their duty without taking any fee or reward therefor from such poor person." The last of the cases cited by the petitioner to show the power of the state courts to furnish paupers with transcripts "without statutory authority therefor" is *State ex rel. Parmenter* v.

District Court, 111 Mont. 453; in that case the court quoted and relied upon Montana Revised Code, section 8931, which explicitly states that when the defendant is unable to pay for the stenographic transcript "the same shall be furnished him and paid for by the county."

Nor is the *Gildersleeve* case contrary to our position. The Court said (p. 530):

> The indigent defendant ought not to be deprived of availing himself of his writ of error because of his poverty, and, when the court has ordered the transcript in the interest of justice, the clerk ought not to be deprived of compensation.

This passing remark is not a precedent here for two reasons. In the first place, it is no part of the decision. All that the Court held was that "the order of the court requiring a service to be performed was sufficient authority as between the clerk and the Government for performance of the service and allowance of the proper fee therefor" (p. 530). In the second place, the dictum does not deal with the instant issue. The monies involved were the clerk's statutory fees under Rev. Stat. 828[22] for preparing a record on appeal and not the compensation of a stenographer. Thus, the *Gildersleeve* case deals only with the power of the court over its own officer and not with its power

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[22] The record in the *Gildersleeve* case (No. 198 October Term 1903) shows at page 4 the charges by the clerk. The item "1,264 folios and seal, at 20 cents" is plainly a charge

over outsiders (see pp. 34–35, *supra*). Moreover, without such a record, review was impossible, as this Court said. In the instant case, as we have shown and as the petitioner concedes (Br. 15, 17, 53), complete review, even on the question of the sufficiency of the evidence, was possible without a verbatim transcript of the evidence. Consequently, unlike the dictum in the *Gildersleeve* case, there is not involved in this case any question of the power of the courts to make it possible for paupers to exercise the right to review granted by Congress. The petitioner had ample means to exercise the right, and his case reduces to the contention that the Government should do the work for him. In the absence of an express statute that request must be denied him.

C. THE FORMA PAUPERIS STATUTE DOES NOT AUTHORIZE THE GOVERNMENT TO SUPPLY IMPECUNIOUS DEFENDANTS WITH VERBATIM TRANSCRIPTS AT PUBLIC EXPENSE

The *forma pauperis* statute (28 U. S. C. 832, *et seq.*) provides in Section 1 that any citizen of the United States may prosecute or defend to a conclusion, including the taking of all appeals, any criminal or civil proceeding in the federal courts "without being required to prepay fees or costs or

made at twice the usual fee of 10 cents a folio allowed by R. S. 828 for preparing a record. By the Act of August 7, 1882, 22 Stat. 344, the clerks in New Mexico were allowed to charge twice the usual statutory fee. The briefs and opinion show that the Court considered the case solely from the point of view of the statutory fees, whatever may be shown by papers in the Court of Claims which were not before it.

for the printing of the record in the appellate court or give security therefor"; and in criminal cases the courts may direct "that the expense of printing the record on appeal be paid by the United States." Section 2 provides for giving permission to proceed as a poor person after suit had been commenced. Section 3 requires the officers of the court to perform their duties and the witnesses to attend in all such cases, as in ordinary litigation. Section 4 authorizes the court to appoint an attorney. Section 5, which provides that judgment may be rendered for costs at the conclusion of the suit as in other cases, contains the express proviso "That the United States shall not be liable for any of the costs thus incurred."

It is apparent that this statute contains no express provision for supplying one entitled to proceed thereunder with a stenographic transcript of the evidence either for use at trial or on appeal. Petitioner urges that such a provision should be inferred (Br. 36), particularly from the direction that the expense of printing the record on appeal may be ordered to be paid by the United States. But the evolution and long-continued and uniform interpretation of the statute disclose that the inference is not permissible.

Act of August 8, 1846.[26]—Prior to 1846 no federal statute enabled paupers to enforce or defend their rights in the federal courts unless they paid or gave security for all the ordinary costs and

[26] 9 Stat. 72, 74 (28 U. S. C. 656).

fees.[27] The Act of August 8, 1846, authorized the district courts in criminal cases to order witnesses within the district, or within 100 miles of the place of trial, to be subpoenaed at the expense of the United States upon an affidavit showing that the defendant required the witnesses for his defense and could not pay the witness fees. Whether to issue the subpoena in such a case was left to the discretion of the court. *Crumpton* v. *United States,* 138 U. S. 361, 365; *Goldsby* v. *United States,* 160 U. S. 70, 73.

This legislation substantially improved the lot of persons accused of crime. In 1846 witnesses would ordinarily be found within the geographical limits fixed by the Act. No appeal or writ of error was allowed in criminal cases.[28] Consequently, the Act absolved poor defendants from most, if not all, of the expenses entailed in making their defense.

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[27] For a general account of the development of *forma pauperis* legislation in this country and England, see Maguire, *Poverty and Civil Litigation* (1923), 36 Harv. L. Rev. 361.

[28] The Act of February 6, 1889 (25 Stat. 655, 656), granted the right of appeal in cases of conviction of a capital crime. Prior to that time a review could be had in a criminal case only upon certificate of division of opinion in the circuit court (Act of April 29, 1802, 2 Stat. 156, 159); or, after 1879 (Act of March 3, 1879, 20 Stat. 354), by writ of error to the circuit courts in cases triable in the district courts if the sentence was imprisonment, or fine and imprisonment, or fine in excess of $300. The first statute allowing the right to a review in criminal cases generally was the Act of March 3, 1891 (26 Stat. 826). See *United States* v. *Sanges*, 144 U. S. 310, 319–322; *Bristol* v. *United States*, 129

Act of July 20, 1892.[29]—The Act of July 20, 1892, which, as amended, still governs all proceedings in *forma pauperis*, was the first federal legislation designed to improve the lot of poor litigants in *civil* cases. Section 1 provided that any citizen "entitled to commence any suit or action in any court of the United States" might commence such an action and prosecute it to a conclusion "without being required to prepay fees or costs, or give security therefor before or after bringing suit or action" provided that he made an oath setting forth his poverty. Sections 2, 3, and 4 of this Act were the same as they are at the present time (see p. 39, *supra*). Section 5 provided for a judgment for costs at the conclusion of the suit, with the express proviso "That the United States shall not be liable for any of the costs thus incurred."

It is apparent from the legislative history, as well as from the words of this enactment, that its sole purpose was to relieve paupers of paying the fees of court officers and witnesses. The statute did not deal at all with such expenses as the compensation of reporters whose presence, though desirable, was not an official part of the court proceedings. Likewise, the statute did not impose any obligation upon the Government to pay the costs and fees instead of the litigant. When he was asked how the court officers would receive

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Fed. 87, 88, 89 (C. C. A. 7). See also Orfield, *Federal Criminal Appeals* (1936), 45 Yale L. J. 1223, 1224–1225.

[29] 27 Stat. 252.

the usual fees in the event that the pauper did not succeed, Congressman Culberson, who was in charge of the bill, stated on the floor of the House that the costs and fees would not be paid, and explained (23 Cong. Rec. 5199):

> We are simply in these cases of charity and humanity compelling these officers, all of whom make good salaries, to do this work for nothing. *That is all the bill does.* There may be one such case upon a docket of five hundred; and they are not required to do much *ex officio* service. [Italics supplied.]

The proviso at the end of Section 5 was inserted out of an abundance of caution. Congress realized that the act would impose no obligations on the United States because the sole purpose was to relieve litigants of paying fees. It added the proviso to make its intention express without changing the meaning. *Ibid.*

Even as a measure dealing only with official costs and fees, the Act of 1892 had two strict limitations. It applied only to plaintiffs and not to defendants. See *Kinney* v. *Plymouth Rock Squab Co.*, 236 U. S. 43, 45. And it did not apply to appellate proceedings. *Galloway* v. *Fort Worth Bank*, 186 U. S. 177; *Bradford* v. *Southern Railway Co.*, 195 U. S. 243. As a necessary corollary of these two limitations, it was recognized that the statute had no application in criminal cases. See *Bristol* v. *United States*, 129 Fed. 87 (C. C. A. 7).

Amendment of June 25, 1910.[30]—The foregoing decisions pointed out deficiencies in the provisions of the Act of July 20, 1892, and, in 1910, Section 1 was amended to read in its present form, with the exception that there was no provision authorizing the Government to pay the expense of printing the record in criminal cases. The purpose, as the Court held in *Kinney* v. *Plymouth Rock Squab Co.*, 236 U. S. 43, 45, was to remove the limitations pointed out above.

These changes brought criminal cases within the Act but they did not expand the services to be sup-

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[30] 36 Stat. 866. The changes made by this amendment are shown in the following print (new matter is in italics and words deleted have a line struck through them):

"SEC. 1. That any citizen of the United States entitled to commence *or defend* any suit or action, *civil or criminal*, in any court of the United States, may, *upon the order of the court*, commence and prosecute *or defend* to conclusion any ~~such~~ suit or action; *or a writ of error, or an appeal to the circuit court of appeals, or to the Supreme Court in such suit or action, including all appellate proceedings, unless the trial court shall certify in writing that in the opinion of the court such appeal or writ of error is not taken in good faith* without being required to prepay fees or costs *or for the printing of the record in the appellate court* or give security therefor, before or after bringing suit or action, *or upon suing out a writ of error or appealing*, upon filing in said court a statement under oath in writing that because of his poverty he is unable to pay the costs of said suit or action *or of such writ of error or appeal*, ~~which he is about to commence~~, or to give security for the same, and that he believes *that* he is entitled to the redress he seeks by such suit or action *or writ of error or appeal*, and setting forth briefly the nature of his alleged cause of action, *or appeal*."

plied free, or impose any liability upon the United States. Section 1 continued to deal only with "fees or costs," except that the pauper was now also relieved of prepayment "for the printing of the record". The final proviso to Section 5 declaring that the United States should not be liable for costs was left undisturbed by the amendment. Accordingly, when the issue involved in the present case arose in *United States* v. *Fair*, 235 Fed. 1015 (N. D. Cal.), it was held:

> * * * Congress did not intend that the United States should be liable for any of the costs incurred under the provisions of the act. * * *
>
> The act evidently applies only to such fees as those of the clerk or marshal, or some other officer of the court. * * *

Consequently, the court concluded that it had no power to order the Government to furnish a transcript of the testimony for the defendant's use on appeal in *forma pauperis* from a judgment of conviction.

The petitioner attacks the reasoning of this decision on the ground that it relies over-much on the proviso to Section 5. We submit, however, that the court followed precisely the course marked out by Congress. The court pointed out that the Act applied only to official fees; this interpretation was exactly what the sponsors of the bill had explained in Congress. The court relied upon the proviso as an express statement of the general pur-

pose; it was to insure that the court would thus recognize the limited purpose that the proviso was added in Congress. We think it is clear, therefore, that the present issue was rightly decided in *United States* v. *Fair, supra,* under the *forma pauperis* statute as it then stood.

Amendment of June 27, 1922.[31]—On November 5, 1919, the Comptroller of the Treasury ruled in answer to an inquiry by the Attorney General that the Attorney General could not lawfully print at the expense of the Government the record on a criminal appeal *in forma pauperis.* 26 Comp. Dec. 362. The effect of this ruling, except as the appellate courts consented to hear cases on typewritten records, was to cut off the pauper's right of appeal, for the Act of February 13, 1911, 36 Stat. 901, required a party appealing to the circuit court of appeals to file twenty-five printed copies of the transcript of record.[32] The Comptroller considered the situation a hard one requiring Congressional relief.

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[31] 42 Stat. 666.

[32] The purpose of this statute, as shown by its title and the report of the House Judiciary Committee (H. Rep. No. 1951, 61st Cong., 3d Sess.), was to diminish the expense of proceedings on appeal. Before its passage the clerks of the district and circuit courts charged for a written or typewritten transcript of the record in preparing the case for review in the circuit court of appeals, the fee for such service being fixed (R. S. § 828). The printing was done under the supervision of the clerk of the circuit court of appeals and, pursuant to the Act of February 19, 1897, 29 Stat. 536, and an order of this Court of February 28, 1898 (169 U. S. 740, 741), he received a fee of 25 cents per printed

Several months later the Attorney General sought to correct the situation by recommending to Congress that the *forma pauperis* statute be amended by adding what is now the final sentence of Section 1. S. Rep. 20, 67th Cong., 1st Sess. The sentence reads:

> *Provided*, That in any criminal case the court may, upon the filing in said court of the affidavit hereinbefore mentioned, direct that the expense of printing the record on appeal or writ of error be paid by the United States, and the same shall be paid when authorized by the Attorney General.

The amendment was reported favorably to the Sixty-sixth and Sixty-seventh Congresses with

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page for indexing the record, preparing it for the printer, supervising the printing, and distributing the copies. *Rainey* v. *Grace & Co.*, 231 U. S. 703, 706–707. In the case cited this Court held that the purpose of the provision of the Act of February 13, 1911, for the filing by the appellant in the circuit court of appeals of a printed record rather than a written or typewritten transcript was to eliminate the expense of the clerk's fee for supervising the printing and that the effect of the act was to repeal that fee in cases where the appellant followed the procedure set forth (231 U. S., at 708–709). The Act of February 13, 1911, does not, however, prevent the circuit court of appeals from hearing an appeal on a stenographic record. Section 2 of the Circuit Court of Appeals Act of March 3, 1891, 26 Stat. 826 (Judicial Code, § 122, 28 U. S. C. 219), authorized those courts to establish rules and regulations for the conduct of their business and several of the courts have made provision in their rules for hearing appeals in *forma pauperis* cases upon typewritten records. (See Rules 10, 18, C. C. A. 6; Rule 11, C. C. A. 9; cf. Rules 26, 28, C. C. A. 3; Rules 10, 11, C. C. A. 4.)

this explanation (S. Rep. 20, 67th Cong., 1st Sess.):

> The object of this bill is to amend the act of July 20, 1892 (27 Stat. L., p. 252), as amended by the act of June 25, 1910 (36 Stat. L., p. 866), to cover a defect pointed out by a decision of the Comptroller of the Treasury, dated November 5, 1919, in which he holds that notwithstanding the provisions of the above acts, a defendant in a criminal case who files an affidavit in forma pauperis is not entitled to have the record printed at the expense of the Government in cases in which an appeal is taken.

Senator Nelson, who sponsored the amendment on the floor, also explained (61 Cong. Rec. 1167):

> * * * the only change in existing law is the proviso at the end of the bill which authorizes the court to pay the expense of printing the record. That is the only change.

The amendment was adopted on June 27, 1922, thus putting the *forma pauperis* statute in its present form. Manifestly, it was intended to deal only with the specific hardship pointed out to Congress.

Petitioner's argument is that the proviso added by the amendment of June 27, 1922, which provides for paying the expense of printing the record, necessarily implies authority to take the earlier step of supplying the verbatim stenographic transcript from which the testimony is incorporated into the printed record. The argument is falla-

cious. It rests on the premise that a verbatim stenographic transcript of the evidence is a prerequisite to the preparation of a complete printed record. But, as we have shown above, ample means are available to prepare a complete bill of exceptions without the use of a verbatim transcript of the evidence; and such a transcript has never been treated as an essential part of appellate proceedings (see pp. 16–28, *supra*). To exercise his rights to the fullest extent the poor defendant did not need a verbatim transcript but he did need a printed record, and that is all the statute gave him.

It is improbable, moreover, that Congress would have made merely by implication such an extreme change in the administration of the criminal law. In the instant case, it is true, the petitioner seeks only to have the Government pay the cost of transcribing stenographic notes already existing. But if this obligation is created by the amendment, then the amendment must also require that the Government supply reporting service and verbatim transcripts to all paupers, for it can scarcely be suggested that Congress was so capricious as on the one hand to grant paupers the right to a transcript at public expense whenever a stenographer happened to take notes at the trial, while on the other hand it withheld the right to a reporter. Had this been intended, the innovation would surely have been mentioned, yet the committee reports and the debate in Congress expressly

limit the amendment to the precise situation reflected in the ruling of the Comptroller.

This amendment of June 27, 1922, was the final step in the development of the present *forma pauperis* statute. Congress has never abandoned its original purpose to exempt paupers from paying fees without imposing liability on any one to pay them instead of the pauper, except in the narrow provision for printing the record in criminal cases. Petitioner argues that the statute must be liberally construed in accordance with its benevolent purpose to permit paupers the same right to a full appeal that others can secure. We agree completely but, we submit, the conclusion which the petitioner would draw does not follow from his premise. As we have shown earlier in this brief, a verbatim transcript of the evidence is not necessary to prepare a bill of exceptions adequate to raise every issue in a case. To use a stenographic transcript is the easy way, and perhaps it is the best way; but it is by no means essential. Under our interpretation of the statute it is feasible for paupers to exercise fully their statutory right to appeal, and the question whether verbatim stenographic transcripts should be supplied free to paupers, like the question whether reporting should be made part of the court machinery, is one for legislative consideration.

D. THE PETITIONER HAS NO CONSTITUTIONAL RIGHT TO BE FURNISHED A COMPLETE VERBATIM TRANSCRIPT OF THE EVIDENCE AT PUBLIC EXPENSE

The petitioner argues (Br. 46–47), albeit faintly, that to deny him a verbatim transcript of the evidence is to deny him his constitutional rights. But it is settled that neither the guarantee of a fair trial by jury (Amend. VI) nor the guarantee of due process (Amend. V) carries a right to appeal. *United States* v. *Sanges*, 144 U. S. 310, 319, and cases cited; *District of Columbia* v. *Clawans*, 300 U. S. 617, 627; *Reetz* v. *Michigan*, 188 U. S. 505, 508. Hence, the contention must be that since Congress permits those who can afford to compensate a reporter to use a verbatim transcript on appeal, therefore Congress must place paupers upon an equal basis by supplying them with such transcripts.[23]

We submit that this contention is unsound without regard to whether the due process clause compels Congress in granting a right of appeal to take affirmative action to make it available to all who may wish to exercise it. Cf. *Boykin* v. *Huff*, 121 F. (2d) 865, 872 (App. D. C.). A pauper has ample opportunity to exercise his right to appeal on all questions even though he cannot procure a verbatim transcript of the evidence (see pp. 16–28,

[23] In passing it is appropriate to observe that if such a constitutional right exists, it is not self-executing. *United States* v. *Van Duzee*, 140 U. S. 169. And the right would, of

supra). The course which he must follow may be more difficult for him and his attorney, and in some cases less satisfactory, than the course open to men who are able to compensate a reporter; but it is clear that the due process clause does not require Congress to make appropriations to place paupers upon absolute equality in litigation with those who command larger means. Greater differences in treatment have been upheld than exist between the preparation of a bill of exceptions without a stenographic report and its preparation with such a report. A pauper cannot appeal as freely as one able to pay the costs and retain his own counsel for he must satisfy the court that his appeal is not frivolous. He may subpoena witnesses only from within a limited area and only in the discretion of the court. Rev. Stat. 878, 28 U. S. C. 656; *Crumpton* v. *United States*, 138 U. S. 361, 365; *Goldsby* v. *United States*, 160 U. S. 70, 73. And due process does not require that a pauper should have counsel at public expense in all cases in which counsel are "allowed." *Betts* v. *Brady*, No. 837, last Term, decided June 1, 1942. So long as other means of preparing a bill of exceptions are available, the right to equal justice under law is not denied to

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course, include the lesser right to have a reporter take down the evidence. The petitioner's contention must be, therefore, that every person who has been convicted without an opportunity to have a verbatim transcript of the testimony, has been convicted without due process of law.

paupers by failing to provide them with the convenience of a verbatim transcript of the evidence.[24]

For the foregoing reasons we submit that neither the *forma pauperis* statute nor any other rule of law authorizes the courts to require the Government to pay the cost of preparing for the petitioner a verbatim transcript of the evidence. The present reporting system reflects the opinion of the courts and bar that a verbatim transcript can be procured only by compensating a private reporter (see pp. 25–28, *supra*). The lower federal courts have consistently followed the decision in *United States* v. *Fair, supra*. *United States ex rel. Estabrook* v. *Otis* 18 F. (2d) 689, 690 (C. C. A. 8); *United States* v. *Strewl*, 28 F. Supp. 87, 88 (N. D. N. Y.); *Estabrook* v. *King*, 119 F. (2d) 607, 610 (C. C. A. 8); *United States ex rel. McNeill* v. *Avis*, 108 F. (2d) 457 (C. C. A. 3); cf. *Coulston* v. *United States*, 51 F. (2d) 178, 180 (C. C. A. 10); *Moder* v. *United States*, 62 F. (2d) 462, 464–465 (App.

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[24] The petitioner argues that he is denied due process because the Government supplies a transcript of the evidence when the court reporter is employed at an annual salary. This contention is based upon a misunderstanding of the practice. The Government no longer employs secretaries for the district judges at an annual salary requiring them to serve as secretary to the district judge *and* to report Government cases free of charge at the request of the Government. That was the situation in *Evans* v. *United States*, 312 U. S. 651. The petitioner also misstates the ruling of the Comptroller General (9 Comp. Gen. 503) when he says (Br. 46) that the Comptroller General ruled "that if the court reporter

D. C.). The Comptroller General ruled in 1930 in response to an inquiry by the Attorney General that the expense of paying a reporter to transcribe his notes for the use of a pauper on appeal from a federal conviction of murder could not be paid from the annual miscellaneous expense appropriation for the United States courts or from any other appropriation under the control of the Department of Justice. 9 Comp. Gen. 503. See also 21 Comp. Gen. 347. And the state courts, in the absence of statute, seem to have come to a like conclusion. *State* v. *Vicknair,* 118 La. 963; *Altis* v. *State,* 109 Neb. 776, 778; *State ex rel. Mahoney* v. *Ronald,* 117 Wash. 641.

II

THE JUDGMENT OF THE CIRCUIT COURT OF APPEALS SHOULD BE VACATED AND THE CAUSE REMANDED TO THE DISTRICT COURT

We have shown in Point I, we submit, that the petitioner is not entitled to the relief which he

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were employed by the Government at an annual salary instead of on a piecework basis the question of requiring him to furnish a transcription to go into the pauper's record 'would be an administrative matter.'" The Comptroller General in ruling that the Department of Justice might not employ a reporter to make a transcript for a pauper went on to say "the question of requiring a stenographer employed upon an annual salary to furnish *an additional transcript if such stenographer reported the case* would be an administrative matter" [italics supplied]. Manifestly, what the Comptroller General had in mind was a case in which the Government might order a stenographer who was already typing the transcript to furnish an additional carbon copy for the pauper.

requested in the circuit court of appeals. We understand that the petitioner now requests, however, that the cause be remanded for the preparation of a bill of exceptions even though it is held that the petitioner is not entitled to the complete transcript.[35]. This request squarely raises the question whether the petitioner is foreclosed from this relief by his previous errors, first in abandoning any attempt to question the sufficiency of the evidence as soon as he learned that he could not afford to pay for a complete transcript, and second in seeking to compel the Government to furnish a transcript instead of asking leave to prepare a bill of exceptions by the other means available.

There can be no doubt of the power of the Court to remand the cause for the settlement of a proper bill of exceptions (*Ray* v. *United States*, 301 U. S. 158, 164–167; *Kay* v. *United States*, 303 U. S. 1; *Walker* v. *United States*, 113 F. (2d) 314 (C. C. A. 9)) even though the questions sought to be presented were not previously raised (cf. *Wiborg* v. *United States*, 163 U. S. 632; *Hemphill* v. *United States*, 312 U. S. 657; *Kessler* v. *Strecker*, 307 U. S. 22, 34).

If this case were to be judged by customary criteria, it would seem clear that the petitioner's request comes too late (see p. 14, n. 9, *supra*). But the petitioner was not represented by counsel

[35] This question was not raised in the circuit court of appeals and, apparently for that reason, was not considered

retained by him and did not personally abandon any rights. He asked the attorneys to question the sufficiency of the evidence but, upon learning that the petitioner could not purchase a complete verbatim transcript, they did not attempt to prepare a bill of exceptions by the other means available. Under these circumstances it would seem that the previous neglect of counsel should not itself prevent the appellate court from exercising its power to permit a remand for amendment of the bill of exceptions to raise the question of the sufficiency of the evidence to sustain the verdict.[36] In making this suggestion we do not imply that a defendant who is represented by appointed counsel may not be bound by their action; in such cases as in all others there must be an end of litigation. But in the instant case the mistake was not one of

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by the court or the United States Attorney on the petition for rehearing.

In his brief (p. 54), the petitioner also suggests that the judge should be directed on the remand to require his secretary to furnish the complete verbatim transcript free of charge. We have already shown this course to be improper (see pp. 24–25, *supra*).

[36] While we agree that the petitioner should not be held to have waived any rights, we cannot subscribe to the suggestions in petitioner's brief (p. 16) that the trial and appellate courts were derelict in their duties. The fact that the notice of appeal stated as one ground a challenge to the sufficiency of the evidence signified nothing; counsel frequently assign grounds at the outset which they abandon later.

tactical judgment and the matter sought to be raised is the fundamental issue of guilt or innocence.

There remains the question whether there is sufficient probability that a bill of exceptions can be settled to warrant a remand. The petitioner's notes (if any) and those of the attorneys may have been destroyed and their recollections of what occurred at the trial must have faded. But since the judge's secretary has volunteered to make dictaphone records, it should be possible for an attorney appointed to represent the petitioner to listen to the records and use them to supplement any other available means such as notes or the recollection of the petitioner and persons present at the trial. Whether these means will prove adequate can best be determined by the trial judge. To remand the cause for this purpose would not delay the administration of justice, for the petitioner already has elected to commence serving his sentence.

CONCLUSION

The Government should not be ordered to supply the petitioner with a complete verbatim transcript of the evidence at public expense; but the judgment of the circuit court of appeals should be vacated and the cause remanded to the circuit court of appeals with instructions to extend for a reasonable period the time for filing a complete bill of exceptions, and to remand the cause to the district court in order that the petitioner may pre-

pare a bill of exceptions and have it settled by any other means available.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

WENDELL BERGE,
Assistant Attorney General.

ARCHIBALD COX,
ROBERT S. ERDAHL,
WALTER J. CUMMINGS, Jr.,
Attorneys.

NOVEMBER 1942.

APPENDIX

DEPARTMENT OF JUSTICE
UNITED STATES ATTORNEY
Western District of Arkansas

July 10, 1942.

Re: *Jessie William Miller* v. *United States.* Your file WB: KB: ekh 109–367.

The ATTORNEY GENERAL,
Washington, D. C.

SIR: Your letter of July 10th, airmail, received this morning.

I immediately called by long distance telephone Mr. John Williams, Court Reporter and Secretary to Hon. Harry J. Lemley, the Judge who presided in this case, at his office in Texarkana, Arkansas, and received the following information:

That no request by Miller or by any lawyer representing him was ever made to Mr. Williams to transcribe his notes in this case. I was informed in my conversation with Mr. Williams this morning that Mr. Philip Alston, who was senior counsel in the case for Miller, happened to be present in Court Reporter Williams' office during our conversation, and Mr. Alston confirms the fact that no attempt was made by the defendant to secure a transcript of this testimony in full. I was further informed that both Judge Lemley and Court Reporter Williams would be very reluctant to

furnish a full transcript of this testimony and in this connection you will please consider the fact that Judge Lemley is one of the hardest worked Judges in the United States, and it would be next to impossible for his secretary to find the time to make this transcript and keep up with his regular work since the trial of the case occupied eight days, and the transcript would be very voluminous. The Court Reporter donated his services in taking the testimony in shorthand, and he states that he is willing to dictate the testimony into a dictaphone, and that the United States may then have a transcript made from the dictaphone records, and he estimates that the cost of typing the transcript from the dictaphone records will amount to from $500 to $600.

I note your comment that it is not clear that the government will be able to compensate a reporter for this work. Under present statutes it is settled beyond doubt that the Court Reporter in this case, who is a salaried secretary of the Judge, cannot charge the United States anything for this work regardless of any regulations which might or might not allow an independent court reporter to be paid for the work. It is my information that the Comptroller General has ruled that a transcript cannot be made at the expense of the United States under the circumstances existing in this case.

Mr. Berge, I want to assure you that no defendant was ever convicted in the Federal Court on clearer or more convincing evidence than this scoundrel. He is a brute of the lowest type and lacks every human sensibility. My first contact with the case was when an FBI Agent called me

over long distance from DeQueen, Arkansas, and related the substance of a preliminary investigation he had just made of the facts. It was evident that this agent was horrified and disgusted at the sheer brutality he had uncovered. I was frankly skeptical as to the advisability of prosecuting the case on account of the supposed fact that the victim was the stepdaughter of Miller, the defendant, but I agreed that a full investigation should be made. When this was done, I, too, was appalled at the facts disclosed. I am sending you herewith some photographs in a sealed envelope which will give you an inkling of the sadistic nature of this defendant. Please compare the picture of this young woman and her baby prior to the time they were kidnapped by this defendant with their pictures after they escaped from his custody and bear in mind that all of the time they were in his company this young woman was picking cotton, which is a remunerative occupation as farm labor goes. See for yourself how much of the income she earned she was permitted to use to buy the barest food for herself and baby.

It is very clear to me that the suspicions of the Circuit Court of Appeals and of the Justice of the Supreme Court who allowed the writ in this case were aroused by the action of Judge Lemley in reducing Miller's sentence from seven years to five years on his own motion as there is no showing in the records why this was done. As a matter of fact this reduction was made under the following circumstances:

Judge Lemley requested me to come to his chambers and upon my arrival I found the attorneys for Miller already there. Judge Lemley stated

that he had sentenced Miller for a term of seven years, calculated on the following basis: that he had taken the age of Miller's youngest child and given Miller a sentence that would insure that his youngest child would be old enough to be selfsupporting by the time Miller was released from prison and would have his or her habits and inclinations fairly well fixed and established, and that he was sure that Miller could not possibly make parole because of his previous record and self-evident criminal personality. Judge Lemley further stated that he was then informed that Miller's wife had secured a divorce from him or that she would very shortly secure one and was assured that Miller would not be permitted to have anything to do with rearing these children, no matter when he was released, and that under these circumstances he had decided to reduce the sentence by two years. I informed Judge Lemley that his action would likely be the source of unending trouble and embarrassment to the government in the case as it would be entirely unexplained and taken without explanation it indicated a doubt in his mind as to the propriety of Miller's conviction.

In conclusion, permit me to observe that if any convict in a Federal penitentiary can on his sole unsupported statement and without even the concurrence of the lawyers who represented him at his trial, cause the United States to go to all the trouble and expense merely to keep him in the penitentiary that Miller has caused the government in this case, then the whole system by which and under which prisoners are condemned needs to be drastically overhauled and improved. There must in every criminal case be a final judgment

and if this final judgment can only be secured by the United States, not simply by the verdict of the jury and sentence by the Court and affirmance by the Circuit Court of Appeals but by a prolonged investigation by the Circuit Court of Appeals and the Supreme Court of the United States into ex parte statements by the convicted defendant, then the personnel of these courts must be greatly enlarged for the majority of convicts will not hesitate to avail themselves of this privilege. I do not see how a decision of the Supreme Court of the United States in this case that the facts justified Miller's conviction will help the situation. The next convict will claim that the facts in his case are entirely different and so on ad infinitum.

This letter by air mail.

Respectfully,

(Signed) CLINTON R. BARRY,
Clinton R. Barry,
United States Attorney.

CRB:MC

DEPARTMENT OF JUSTICE

UNITED STATES ATTORNEY

Western District of Arkansas

FORT SMITH, ARKANSAS,
August 5, 1942.

Re: *Jesse William Miller* vs. *United States.*
Your File: WB:RSE:mgm.

The ATTORNEY GENERAL,
Department of Justice, Washington, D. C.

SIR: Reference is made to your letter of July 28, 1942, relative to the preparation of the transcript

for the appeal of Jesse William Miller from the District Court to the Eighth Circuit Court of Appeals.

After receiving your letter I immediately requested Mr. John T. Williams, Secretary to the Honorable Harry J. Lemley, and Official Court Reporter, to furnish me with the information requested in your letter. I am enclosing herewith the correspondence received from Mr. Williams and which is self-explanatory. You will note that Jesse William Miller, through his attorney, Mr. Phil G. Alston, requested Mr. Williams, the Court Reporter, to furnish a transcript pertaining only to that part of the case relative to the age of the victim and the facts surrounding the parental relationship between the victim and Jesse William Miller.

The age of the victim and the parental relationship was solely the only question of law involved in the case and that is whether or not the word *parent* as used in the Federal Kidnaping Act included a step-parent who had never been in loco parentis to said step-child. The defense of Jesse William Miller was based upon two questions. First, he did not kidnap her, which was the question of fact, and which was submitted to the jury upon proper instructions and which the jury found adversely to the contention of Jesse William Miller. Second defense being a question of law, that is, the victim being a minor and his being a step-parent of the victim brought him within the exceptions of the Federal Kidnaping Act, and this question was decided adversely to him in the Circuit Court of Appeals.

If there is any additional information desired please advise.

Respectfully,

CLINTON R. BARRY,
United States Attorney.
(Signed) THOMAS C. PITTS,
By: Thomas C. Pitts,
Assistant United States Attorney.

TCP ng.

[Copy]

UNITED STATES DISTRICT JUDGE'S CHAMBERS

EASTERN AND WESTERN DISTRICTS OF ARKANSAS

TEXARKANA, ARKANSAS, *August 4, 1942.*

HARRY J. LEMLEY
District Judge

Re: *Jesse William Miller* v. *United States.*

MR. CLINTON R. BARRY,
United States Attorney,
Fort Smith, Arkansas.

(Attention: Mr. Thos. C. Pitts, Asst. U. S. Attorney.)

DEAR MR. PITTS: I have your letter of August 3rd, transmitting to me request from the Attorney General as to what part of the record I was requested to transcribe in this case and the amount of money that Miller paid me for transcribing that part of the record I furnished him, and in reply would advise you as follows:

A day or two after Miller had been sentenced to serve seven years on the kidnapping charge by

Judge Lemley, inquiry was made to me by Mr. Philip G. Alston, one of Court appointed counsel for Miller, as to what would be the approximate cost for the entire trial record, to which I replied that the cost would be from $500 to $600 for a record 700 to 800 pages in length. The trial, you will recall, lasted seven days. Upon receiving this information, Mr. Alston informed me that it would not be possible to pay for the entire record.

A short time later Mr. Alston informed me that $100 had been turned over to him by Mrs. Miller to be used in prosecuting an appeal, and he offered to pay me $50 for my services in preparing such part of the trial record as might be necessary to prosecute an appeal based on the question of law in connection with the prosecuting witness' age. Such a record was prepared and delivered to Mr. Alston, who gave me a check for the $50 payment, and I gave Mr. Alston a statement and receipt, copy of which is attached hereto, which reflects that there is still a balance due me from Miller of $62.00.

I trust that the above is the information desired. With kind regards, I am,

Very truly yours,

(Signed) JOHN T. WILLIAMS,
John T. Williams,
Official Court Reporter.

JTW.
Encl.

[Copy]

UNITED STATES DISTRICT JUDGE'S CHAMBERS

EASTERN AND WESTERN DISTRICTS OF ARKANSAS

TEXARKANA, ARKANSAS, *August 4, 1942*

HARRY J. LEMLEY,
District Judge

Re: *Jesse William Miller* v. *United States.*

Mr. THOMAS C. PITTS,
Asst. United States Attorney,
Fort Smith, Arkansas.

DEAR TOM: By way of supplementing my earlier letter to you dated today, I would appreciate it if you would advise the attorney general that my courts convene beginning the early part of October, and if I am to dictate the record in the Miller case, I should like to be advised at as early a date as possible, in order that I may get it out of the way this summer, and so that my typist may get at it without delay, as there is a possibility that she will be otherwise occupied this fall.

With kind personal regards, I am,

Sincerely yours,

(Signed) JOHN T. WILLIAMS,
John T. Williams,
Official United States
District Court Reporter.

JTW.

[Copy]

In Account With

JOHN T. WILLIAMS

Official United States District Court Reporter

306 Federal Building

TEXARKANA, ARKANSAS, *March 6th, 1942.*

To: Mr. Jesse William Miller, c/o Hon. Phil G. Alston, Attorney at Law, Texarkana, Arkansas.

For: Per diem for reporting trial of case of *United States* vs. *Jesse William Miller and Artilla Miller,* in U. S. District Court, at Texarkana, Arkansas, January 27, 28, 29, 30, & 31, February 1 and 3, 1941:

7 days @ $10.00 per day		$70.00
Partial transcript of proceedings		
60 pages (1 original & 3 copies)	@ 70¢	42.00
Total		112.00
Paid on account, by check from Hon. Phil G. Alston, March 6, 1941		50.00
Balance due		62.00

DEPARTMENT OF JUSTICE

UNITED STATES ATTORNEY

Western District of Arkansas

FORT SMITH, ARKANSAS,
September 24, 1942.

Re: *Miller* vs. *United States.*

Hon. WENDELL BERGE,
Assistant Attorney General,
Department of Justice, Washington, D. C.

SIR: Your telegram in the above matter comes to my notice upon my return to Fort Smith from attending a regular term of court at Hot Springs.

We have no arrangements for reporting cases in which the United States is interested or for securing transcripts in such cases, whether civil or criminal. Under the statutes as they now stand, there is no way in which Secretary Reporter John T. Williams, in Judge Lemley's Court, can be paid, and the same situation exists in Judge Miller's Court with reference to Secretary Reporter Ben Mosley. Several years ago Mr. Mosley reported and furnished transcripts in some war risk insurance cases which were appealed by the United States and was paid for his services. Upon audit of the vouchers by the General Accounting office Mr. Mosley was required to repay several hundred dollars to the Treasurer, and since that time he has been fully aware of the statutes.

Both Mr. Williams and Mr. Mosley have been very generous in the amount of free work which

they have done for the United States in cases where it was vitally important to have testimony recorded and transcribed. They are subject to the orders of the respective judges whom they serve however, and these judges have emphatically stated that they will not permit them to do this work when it interferes in any way with their duties as secretary reporters.

The situation would not handicap the Government in this district in any way if any other reporter was available and could be used under special authorization. Unfortunately there is no stenographer in the district who can do this work and who is in position to accept the very occasional employment that would be involved. I make this statement with full knowledge whereof I speak, as I have during the past eight years made every possible effort to locate some stenographer who could do the work and who was available when needed. I interviewed the reporters of the state courts in the district and found that none of them would consider an arrangement of this kind because it would interfere with their work in their permanent positions.

The nearest place where a court reporter might be secured would be Little Rock, 160 miles from this city, and I am not able to give any assurance that one could be found there. In describing the situation here, I am not taking into consideration the adverse effect of the present war. As you know, every person who makes any pretense of being a stenographer is already employed in some position that requires their full time.

I have consistently and urgently called this situation to the attention of the Department of Justice at every conference of United States Attorneys held during the past eight years, and have urged other United States Attorneys under the same handicap to join me in urging the Department to ask Congress to do something about it. About two years ago, Mr. Alexander, United States Attorney at Topeka, Kansas, informed me that the United States had a contract with the Secretary Reporter to Judge Hopkins under which he was paid $500.00 per year flat to report and furnish transcripts to the Government in any case the United States Attorney desired to have reported. I asked Mr. Alexander how such an arrangement could be approved under the statute which prohibits extra compensation being paid to any person in the employ of the government under salary such as received by a judge's secretary, but he was unable to give me this information.

In the present case, as you have already been informed, Mr. Williams reported the testimony without charge. I do not know whether Judge Lemley requested him to do this or not. It was my understanding and I was so informed by some peace officer at the trial, that Miller had $150.00 in cash with him when he came to Texarkana for the trial. His affidavit as a poor person had been made and acted on by the Court several weeks before the trial, but in view of the fact that he was charged with a capital offense I did not feel disposed to call the Court's attention to the statement made to me that he was actually in position to pay at least a part of the costs. In addition to this, he

came to Texarkana in an automobile which I did not see, but which I am sure was a jalopy of very little value.

Respectfully,

(Signed) CLINTON R. BARRY,
Clinton R. Barry,
United States Attorney.

CRB/ng.

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Supreme Court, U. S.
FILED
DEC 30 1942
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 76

JESSIE WILLIAM MILLER,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

PETITION FOR RECONSIDERATION.

HOWARD C. WESTWOOD,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 76

JESSIE WILLIAM MILLER,

vs. *Petitioner,*

THE UNITED STATES OF AMERICA.

PETITION FOR RECONSIDERATION.

The Petitioner respectfully requests reconsideration of the Court's decision in this case rendered on December 7, 1942. The opinion as originally announced was amended by order dated December 14, 1942.

I.

Introduction.

The Court has properly held that this case should be remanded with instructions to the Circuit Court of Appeals to permit the settlement of a bill of exceptions in the District Court which will present the question whether the evidence supports the verdict. The Court did not hold, however, that lower courts have the power to order that a transcript of all the evidence, or pertinent parts thereof, be prepared at public expense for use in making up a bill

of exceptions for a pauper's appeal in a criminal case. The Petitioner urges that the lower courts have such power, to be exercised, in the interest of justice, where the circumstances justify, and that this Court, for reasons hereafter set forth, should recognize such power in remanding this case.

II.

This Court Should Determine Whether A Trial Court Has the Inherent Power to Provide A Transcript.

The opinion states that it is unnecessary to decide whether a District Court has inherent power to order the preparation of a transcript. This view is taken since the Respondent has represented that the court reporter is ready to read his notes into a dictaphone and to make the dictaphone records available to the Petitioner without charge. The opinion concludes that, therefore, it would seem possible to prepare an adequate bill of exceptions without a transcript.

A. Probable Difficulties in Preparing a Bill of Exceptions without a Transcript Make it Appropriate to Recognize the Power to Provide a Transcript.

There are circumstances here which indicate probable difficulties to be encountered in preparing a bill of exceptions even with the aid which the Respondent has assured. These circumstances are so important that, if the District Court has the inherent power to provide a transcript, it is most desirable that this Court point out the extent of that power before the case is returned.

The question to be at issue is the sufficiency of all the evidence to show a crime involving elements that require an appraisal of the intent of the petitioner, of his wife, of his wife's daughter, and the effect of an atmosphere surrounding their conduct and the conduct of the daughter's

husband over an extended period of time three years ago at a number of different places in Arkansas and Texas (R. 6-8).

The trial lasted for seven days (R. 14). Many of the witnesses were uneducated people who did not speak with the polish of persons more fortunately situated (R. 26). It is most likely that to translate their peculiar idiom into a narrative will fall prejudicially short of reproducing for appellate scrutiny the exact bearing of their testimony upon the very human elements which must be weighed in determining whether there was sufficient proof of the crime alleged in this case.

The trial, moreover, occurred two years ago, in February, 1941.

The trial judge, it is said, "is one of the hardest worked Judges in the United States". See Appendix to Respondent's Brief, at p. 59. His present recollection of evidence two years old cannot be very clear.

Furthermore, there is a serious question whether the district attorney will give impartial assistance. His letter to the Attorney General appearing in the appendix to the Respondent's Brief shows bitter *personal* antagonism to the Petitioner. He states that the Petitioner is a "scoundrel" and

> "is a brute of the lowest type and lacks every human sensibility. * * *
>
> "* * * if any convict in a Federal penitentiary can on his sole unsupported statement and without even the concurrence of the lawyers who represented him at his trial, cause the United States to go to all the trouble and expense merely to keep him in the penitentiary that Miller has caused the government in this case, then the whole system by which and under which prisoners are condemned needs to be drastically overhauled and improved." See Appendix to Respondent's Brief, at pp. 59, 61.

These intemperate statements, which are not accurate in their inference as to the attitude of the Petitioner's trial counsel, and which upbraid the P itioner for doing nothing more than to request the trial judge to reduce his sentence (a request which the judge granted) and to ask for his right to appellate review (a right which the Respondent here has admitted and which this Court has protected), show that the district attorney is not likely to be cooperative.

Likewise, it must be kept in mind that there is no counsel representing the Petitioner in the lower courts. The Petitioner had to take the case into his own hands in making the application to the Circuit Court of Appeals for a bill of exceptions. It may be that counsel who represented him at the trial will not agree to resume responsibility. (Compare R. 28-29.) Entirely new counsel may, therefore, have to be appointed, as happened in this Court.

Finally, the Petitioner is in Leavenworth. He has been there ever since shortly after his conviction and before that he was in jail. Hence for two years he has been subject to prison censorship and to the consequent difficulties of keeping in touch with the witnesses. (Compare R. 26.) Moreover, he is a man of very rudimentary education and limited background. See Appendix B to Petitioner's Brief. Hence he will hardly have either the capacity or the freedom to prepare a bill himself—even with the aid of dictaphone records—or to be of effective assistance to such counsel as may be appointed.

In these circumstances, if a trial court has the inherent power to require that a transcript of at least portions of the testimony be provided at public expense, it is quite likely that the lower courts would find it proper to make such provision in this case. Otherwise a burden of work and expense will fall upon some appointed counsel, the trial judge

and the district attorney out of all proportion to the cost of such transcription.

B. Applicable Court Rules Permit Setting Forth Evidence in Full in Bill of Exceptions.

The applicable Rule of Court provides that evidence embraced in a bill of exceptions

> "may be set forth in full or in condensed and narrative form."[1]

In other words, there is no longer the requirement of—or even a preference for—a narrative statement.

C. There Is an Appropriation Available to Pay for a Transcript.

The only further reason appearing in the opinion for not passing upon the question of a trial court's inherent power to order a transcript is the following statement in point 3 at page 4 of the opinion:

> "The respondent points out that the Comptroller General has ruled that there is no appropriation from which such expense may be paid and, whether he is or is not right, it remains that no appropriation is available without authorization of payment by the Attorney General. That officer appears unwilling to test the matter by making such authorization."

This conclusion, it is submitted, should be reconsidered. In the first place, the ruling of the Comptroller General referred to did not consider the question of the availability of an appropriation were it to be held that a trial court has the inherent power which we have urged. Rather, that ruling relies on *United States* v. *Fair*, 235 Fed. 1015 (N. D.

[1] See Rule 8 of this Court, which is made applicable to the preparation of bills of exceptions by Rule 9 of the Rules of Criminal Procedure after Verdict.

Calif., 1916), which in turn construes the proviso in section 5 of the Act of 1892, as amended in 1910, to be a prohibition against the United States' paying any expense to aid a pauper in a criminal case. As shown in the Petitioner's Brief at pp. 37-40, this reasoning is fallacious. Nor has this Court, in its opinion, construed the proviso in section 5 of the Act to have the effect attributed to it in the *Fair* case.

The fact of the matter is that there is every reason to believe that the Comptroller General would rule that the appropriation for miscellaneous expenses of the United States Courts would be available to meet expenses involved in the exercise of a court's inherent power. The Comptroller of the Treasury ruled, prior to the 1910 amendment to the Act of 1892, that such appropriation was available to pay the cost of printing the record for a pauper criminal defendant. 1 Comp. Dec. 29 (1894); see Petitioner's Brief, p. 30, n. 1. And after the 1910 amendment he recognized that, but for the alleged prohibition in the proviso in section 5 of the Act, the prior ruling would remain a controlling precedent. See 26 Comp. Dec. 362 (1919). Furthermore, there is now a specific item in the appropriation for miscellaneous expenses covering "stenographic reporting service". See Petitioner's Brief, at pp. 52-53.

In the second place, the statement that "no appropriation is available without authorization of payment by the Attorney General" overlooks the fact that the entire appropriation for miscellaneous expenses of the United States Courts is now administered by the Director of the Administrative Office of the United States Courts. This is specifically provided in the appropriation act.[2] *The Attorney General no*

[2] The current appropriation will be found in Public No. 664, 77th Cong., 2d. Sess., c. 472, Title IV.

longer has anything to do with such appropriations. Nor has the Respondent made any contention that the Attorney General has the power to supervise the expenditure of this appropriation.

We are advised by the Administrative Office that the appropriation for miscellaneous expenses has been used for a variety of purposes, ranging all the way from repairing oil paintings to paying the cost of psychiatric examinations of criminal defendants. And, as pointed out in the Petitioner's Reply Brief, at p. 8, that appropriation has likewise been held available to pay for taking and transcribing the deposition of a witness for a pauper defendant in a criminal case within the territorial limits fixed by 28 U. S. C. A. §656, and for the services of a pauper defendant's expert witness in a criminal case. 21 Comp. Gen. 347 (1941); *United States* v. *Fox,* 19 F. Supp. 463 (S. D. N. Y., 1937).

We are likewise advised by the Administrative Office that the specific item in the appropriation act for "stenographic reporting services" has covered stenographic services for such diverse purposes as disbarment proceedings, contempt proceedings, judicial conferences, and an investigation to determine whether an emergency still exists under the agricultural compositions and extensions sections of the Bankruptcy Act. 11 U. S. C. A. §203 (s) (6).

In short, there really can be no serious question about the availability of an appropriation if it is held that the courts have the inherent power to lend aid to a pauper.

Consequently, it is submitted that the statements in the Court's opinion on this subject should be reconsidered, and that the Court should pass upon the question of the inherent power, in the interest of justice, to order preparation of a transcript.

III.

The Decision That the Act of 1892 Does Not Permit the Provision of a Transcript Should Be Reconsidered.

In point 2 at page 4 of the opinion it is concluded that the Act of July 20, 1892, as amended, "applies only to court costs" and that the Judge's secretary who reported the trial in this case "is not an officer of the United States in his capacity as reporter * * * and his compensation cannot be treated as costs."

It is submitted that these conclusions should be reconsidered.

So far as the status of the reporter in this case is concerned the record shows that he is the official court reporter. Thus the Government's answer to the Petitioner's Petition for Rehearing in the Circuit Court of Appeals states that the secretary is the

> "Official Court Reporter for the Texarkana Division of the U. S. District Court for the Western District of Arkansas" (R. 18; see also R. 14).

And the reporter's certification on the bill of exceptions settled by the trial judge provided:

> "I, John T. Williams, hereby certify that I am the Official Reporter for the United States District Court, Western District of Arkansas, and that as such Reporter I attended the trial of the cause * * *
> "Witness my hand as such Official Reporter on this the 6th day of March, 1941.
> "John T. Williams, Official Reporter" (R. 38).

So far as compensation to a reporter being treated as costs is concerned, that is frequently done in civil cases. Indeed, Rule 80 of the Rules of Civil Procedure specifically provides for such treatment. Such treatment has the sanc-

tion of long standing judicial decision. *Ex parte Peterson*, 253 U. S. 300, 317 (1920); *In re Borok*, 50 F. (2d) 75, 78 (C. C. A. 2, 1931); *Corporation of St. Anthony v. Houlihan*, 184 Fed. 252, 255 (C. C. A. 1, 1910); *cf. Guardian Trust Co. v. Kansas City So. Ry. Co.*, 28 F. (2d) 233, 242 (C. C. A. 8, 1928).

If a reporter's compensation may be taxed as costs in a civil case—despite the absence of a statute providing therefor—no reason is perceived that such compensation can not be treated as costs in a criminal case.

IV.

The Provision of Rule 7 of the Criminal Rules Should Be Invited to the Attention of the Lower Courts.

In point 5 on page 6 of the opinion the Court has set forth the steps to be taken upon a remand of the case. This passage of the opinion does not, however, refer to the effect to be given to Rule 7 of the Rules of Criminal Procedure after Verdict. That Rule provides:

> "The clerk of the trial court shall immediately notify the trial judge of the filing of the notice of appeal, and thereupon the trial judge shall at once direct the appellant or his attorney, and the United States Attorney, to appear before him and shall give such directions as may be appropriate with respect to the preparation of the record on appeal, including directions for the purpose of making promptly available all necessary transcripts of testimony and proceedings . . ."

This Rule has been judicially interpreted only once, so far as we can find. That was in *Boykin* v. *Huff*, 121 F. (2d) 865, 873 (App. D. C., 1941), where the court held that the Rule places the initiative on the trial judge and the clerk. See discussion in Petitioner's Brief, at pp. 15-16.

In view of this Petitioner's situation, the obstacles he has encountered and the difficulties which he still must face,

and in view of the fact that the steps called for by Rule 7 apparently were not taken in this case, it is submitted that it would be appropriate for this Court to invite the lower courts' attention to Rule 7 and to the affirmative duty of the trial court which that Rule implies.

The blunt fact is that this Petitioner needs help which he has not heretofore received from anyone. The Respondent has argued in its Brief, at pp. 22-23, that Rule 7 means merely that after a bill of exceptions is presented, the trial judge is to give assistance. Any such limited effect largely deprives Rule 7 of significant meaning. The Rule must mean something; and where a defendant is a pauper, uneducated, in the penitentiary and without counsel in the lower courts, it should mean a good deal.

VI.

Conclusion.

It is therefore respectfully submitted that this Petition should be granted, that the Court's opinion of December 7, 1942, as amended, should be reconsidered in the respects indicated, and that this Court should decide that, to the extent appropriate in the interest of justice, a transcript of the evidence in this case can be furnished to the Petitioner at public expense.

HOWARD C. WESTWOOD,
CHARLES M. DAVISON, JR.,
Attorneys for Petitioner.

Dec. 30, 1942.

I, Howard C. Westwood, attorney for Petitioner, hereby certify that the foregoing petition for reconsideration is presented in good faith and not for delay.

HOWARD C. WESTWOOD.

pp. 3-5

SUPREME COURT OF THE UNITED STATES.

No. 76.—October Term, 1942.

Jessie William Miller, Petitioner, vs. The United States of America.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[December 7, 1942.]

Mr. Justice Roberts delivered the opinion of the Court.

This case presents important questions in respect of criminal proceedings against poor persons in federal courts. For this reason we granted certiorari.

The petitioner was indicted, tried, and convicted in the United States District Court for Western Arkansas for kidnapping in violation of Title 18 U. S. Code §408a. As he was without funds to conduct his defense, the court appointed counsel for him. The person charged to have been kidnapped was the illegitimate daughter of petitioner's wife.

Two defenses were presented. The first was that the petitioner came within the exception stated in the statute, that it shall not apply to a kidnapping "in the case of a minor, by a parent thereof". To sustain this defense petitioner offered evidence to prove that the girl was a minor and that, having married her mother, he stood in the relation of a parent to her. The second defense was that the petitioner had neither taken nor detained the young woman against her will. The District Judge ruled against the petitioner's contention that he was a parent within the intendment of the statute, but sent the case to the jury on the question whether he had apprehended or detained his wife's daughter against her will. The jury rendered a verdict of guilty. Judgment of sentence was entered.

In due time petitioner's counsel filed notice of appeal in which, amongst others, reasons advanced were that the court erred in refusing peremptory instructions for acquittal at the conclusion of the Government's case and at the conclusion of all the evidence; that the verdict of the jury was contrary to the weight of the

evidence, and that the court erred in refusing to instruct the jury that if they found the complaining witness was under the age of eighteen years at the time of the kidnapping they must find the petitioner not guilty.

The District Court entered an order permitting the petitioner to appeal *in forma pauperis* and the Circuit Court of Appeals also permitted the prosecution of the proceedings in that court *in forma pauperis*.

In connection with the appeal, errors were specifically assigned to the ruling of the District Court respecting the status of the petitioner as a parent, but no error was so assigned to the action of the court in submitting the fact questions respecting the alleged apprehension and detention of the complaining witness, although the assignments of error concluded with a prayer for a reversal for "other manifest errors in the record and proceedings". The Bill of Exceptions allowed by the District Court set forth only so much of the proceedings as went to the question of petitioner's asserted parenthood of the alleged minor. It also included the proceedings on motions for directed verdict and the action of the court upon those motions but none of the evidence on which the motions were based.

The Circuit Court of Appeals affirmed the judgment and, in so doing, dealt only with the question of the petitioner's parenthood.[1] At the close of its opinion it stated: "No other question having been raised on this appeal, it follows that the judgment must be and is affirmed."

The petitioner entered upon service of his sentence and, being without counsel, personally forwarded to the Circuit Court of Appeals a petition for the appointment of counsel and a petition for rehearing. In the latter he urged that there was no testimony in the record indicating that he took or detained his wife's daughter against her will, and prayed that the Circuit Court of Appeals issue a writ of certiorari to bring up a complete transcript of the testimony taken at his trial. In a *per curiam* opinion,[2] the court stated that it had decided the only question before it, but ordered that the United States Attorney answer the petition so that it might be ascertained whether a Bill of Exceptions could be prepared to raise the questions which the petitioner desired to have

[1] 123 F. 2d 715.
[2] 124 F. 2d 849.

decided. The prosecuting officer answered alleging that the entire testimony in the case had been taken stenographically by the district judge's secretary, whose notes were available and could be transcribed; that parts of the testimony had been taken by a stenographer who sat at the defendant's counsel table and that, upon inspection, it was found that the notes of the latter were incomplete and inaccurate and the United States Attorney was unwilling to have them used as the basis of a Bill of Exceptions. The answer further set forth that the judge's secretary had important duties to perform; that the testimony which he took stenographically was of large volume; that its transcription would involve labor for which he ought to be paid; and that the Government could not be required to pay for a transcript of the evidence or to furnish such a transcript to the defendant.

To this answer the petitioner filed a response in which, amongst other things, he alleged that he had repeatedly urged his attorney to present to the Circuit Court of Appeals the question of the sufficiency of the evidence to sustain his conviction and that his attorney had invariably replied that this could not be done without obtaining a transcript of the evidence so as to make a proper Bill of Exceptions covering the subject; that the attorney further advised him that a transcript of the testimony could not be procured because the petitioner had no funds to pay for its preparation. It stands admitted on the record that these are the facts.

The Circuit Court of Appeals, in a third opinion,[3] stated that it had requested a response to the petition for rehearing in order to ascertain whether the Government, as in *Holmes* v. *United States*, 314 U. S. 583, would consent to the vacation of the judgment so that a proper record might be made as the basis for consideration of the question urged by the petitioner. The court stated that, in view of the Government's opposition to a vacation of the judgment or a reopening of the case, it felt itself without power to act further in the matter and indicated that if the petitioner desired to bring the cause to this court such facilities should be furnished him as were necessary to that end without the obligation to pay fees or costs.

The petitioner presented to this Court a petition for certiorari and a petition for leave to proceed *in forma pauperis*. We granted the writ and gave leave to proceed *in forma pauperis*. As he

[3] 126 F. 2d 462.

was without counsel we appointed counsel to act for him in this Court.

1. There is no law of the United States creating the position of official court stenographer and none requiring the stenographic report of any case, civil or criminal, and there is none providing for payment for the services of a stenographer in reporting judicial proceedings. The practice has been for the parties to agree that a designated person shall so report. The one selected must be paid by private arrangement with one or more of the parties to the litigation. The amount paid to him is not costs in the cause nor taxable as such against any of the parties.

2. At the instance of the Conference of Senior Circuit Judges, legislation has been introduced in Congress to provide an official system of reporting and to defray the cost of it. That legislation, as we understand, will, if adopted, obviate the difficulties presented in this case. As the matter stands, however, it is clear that the judge's secretary who stenographically reported the trial is not an officer of the United States in his capacity as reporter, is not entitled to fees from the United States for his services, and his compensation cannot be treated as costs. The Act of July 20, 1892, as amended,[4] applies only to court costs, permits the taking of an appeal without prepayment of cost of printing the record in the appellate court, and provides in certain cases for the printing of that record at Government expense. It does not authorize the procurement of a transcript of the testimony nor the payment for services in reporting evidence taken at the trial nor for the obtaining of it by the Government in behalf of an indigent defendant.

3. It is urged by the petitioner that the District Court has inherent power, in the interests of justice, to order preparation of a transcript for the petitioner's use in making up a bill of exceptions and to impose the expense of so doing upon the Government. The respondent points out that the Comptroller General has ruled that there is no appropriation from which such expense may be paid[5] and, whether he is or is not right, it remains that no appropriation is available without authorization of payment by the Attorney General. That officer appears unwilling to test the matter by making such authorization. We need not

[4] 28 U. S. C. § 832.

[5] 9 Comp. Gen. 503; cf. 21 Comp. Gen. 347.

stop to consider these opposing views because of the facts developed in the briefs and in argument.

4. As we have said, ~~a stenographer, on behalf of the defendant, took notes of much of the testimony given at the trial. The United States Attorney asserted in his answer to the petition for rehearing that her notes proved so inaccurate that they could not be made the basis of a proper bill of exceptions. But this is not to say they are utterly useless, when corrected, as the basis for a bill. In addition~~, the trial judge's secretary took stenographic notes of the entire testimony and his notes are available. It was stated at the bar that this gentleman stands ready to read his notes into a dictaphone without charge to the petitioner. In the light of these facts it would seem that it is possible to prepare an adequate bill of exceptions fairly reflecting the purport of the testimony.

It has become the usual, because the more convenient, method to prepare a bill of exceptions by the use of a stenographic transcript of the evidence. Even so, the bill ought not to contain all of the evidence but only that which is relevant to the issues made upon the appeal and often it is expedient and satisfactory to summarize the evidence and transmute it into narrative form. Historically a bill of exceptions does not embody a verbatim transcript of the evidence but, on the contrary, a statement with respect to the evidence adequate to present the contentions made in the appellate court. Such a bill may be prepared from notes kept by counsel, from the judge's notes, from the recollection of witnesses as to what occurred at the trial, and, in short, from any and all sources which will contribute to a veracious account of the trial judge's action and the basis on which his ruling was invoked.

Counsel in this case could, therefore, have prepared and presented to the trial judge, as was his duty, a bill of exceptions so prepared, and it would then have become the duty of the trial judge to approve it, if accurate, or, if not, to assist in making it accurately reflect the trial proceedings. ~~We are urged to hold that, in view of counsel's failure so to do, petitioner is now foreclosed~~. We are unwilling ~~as to rule~~, in the circumstances of this case. Petitioner repeatedly insisted that counsel procure a proper record on appeal to present the question of the sufficiency of the evidence to sustain his conviction. The petitioner

hold that the petitioner is foreclosed from obtaining a bill

did everything that lay within his power to obtain such a proper record, and we think he should not be penalized for the failure of his appointed counsel to take the necessary measures, if the power exists to afford him a hearing on the point he deems material.

5. We are of opinion that the Circuit Court of Appeals had power in the circumstances to remand the cause for the settlement of a proper bill of exceptions. Rule 4 of the Criminal Appeals' Rules[6] provides that, after the filing of the notice of appeal, the appellate court shall have supervision of the proceedings on appeal including the proceedings relating to the preparation of the record on appeal, and that it may entertain a motion for directions to the trial court. This power extends to the procurement of a proper bill of exceptions[7] and ought to be liberally exercised where the contention is that the evidence is insufficient to support the verdict.[8]

We think the right course in this instance is to remand the cause to the Circuit Court of Appeals in order that it may enter an order permitting the settlement of a bill of exceptions in the District Court to present the point urged by petitioner. Upon the entry of such an order it will be the duty of counsel for petitioner to present a bill made up from the best sources available. It will then become the duty of the district judge to assist in amplifying, correcting, and perfecting this bill from such sources, and to settle the same in order to present the evidence given at the trial. From such a bill the Circuit Court of Appeals will no doubt be able to decide whether there was evidence to sustain petitioner's conviction.

So ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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[6] 18 U. S. C. A. § 688ff.

[7] Ray v. United States, 301 U. S. 158, 164, 167; Holmes v. United States, 314 U. S. 583.

[8] Hemphill v. United States, 312 U. S. 657.